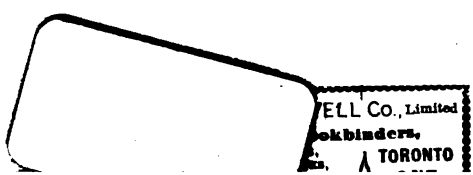
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TABLE OF THE NAMES OF CASES

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VOL. VI. TORONTO, AUGUST 1, 1907. No. 1.

MANITOBA.

DECEMBER 21ST, 1906.

COURT OF APPEAL.

TELLIER v. DUJARDIN.

Gift—Parent and Child—Chattel—Possession — Ownership —Evidence—Delivery—Legal Title.

Appeal by defendant from judgment of a County Court in favour of plaintiff in an action for the recovery of a piano which plaintiff claimed as a gift from her father.

J. E. O'Connor, for defendant.

J. Bernier, for plaintiff.

The judgment of the Court (PERDUE and PHIPPEN, JJ. A.), was delivered by

PHIPPEN, J.A.:—Plaintiff resided with her late father from infancy until her marriage in September, 1904. Plaintiff states that about 8 years ago her father purchased the piano in question and presented it to her as a birthday gift. It remained in the father's house until his death, in April last, when it was removed by defendant, claiming to have bought it from the deceased.

The plaintiff, according to the evidence, lived with her father as housekeeper. Her testimony is that the piano was always treated as her property and was generally known as hers, in which respect, it is contended, it differed from the other furniture in the house. On her marriage plaintiff

moved to the United States, where she resided about 4 months. She then returned to Winnipeg, where she has since lived with her husband, in various apartments and houses. On her return she requested her father to allow her to take her piano, but he, while promising to let her have it, postponed its delivery on various pretexts.

Plaintiff's story is corroborated by a Mrs. Coupez, who states that shortly after the purchase of the piano the late Mr. D'Aoust, the plaintiff's father, invited her "to go up to his rooms and try the piano he had bought for Agnes" (the plaintiff). It is also corroborated by plaintiff's husband, who relates a conversation between plaintiff and her father which took place after their return from the United States.

The County Court Judge, who tried the case without a jury, found as a fact "that there was a gift and acceptance of the piano in question from D. D'Aoust to the plaintiff. . . . and that D. D'Aoust was a trustee thereof at the time of the purported sale to the defendant;" and he entered a verdict in plaintiff's favour.

From this verdict defendant appeals, contending that there is no sufficient evidence of delivery by D'Aoust to the plaintiff. He relies principally on the cases of Cochran v. Moore, 25 Q. B. D. 57; Irons v. Smallpiece, 2 B. & Ad. 551; and Jones v. Locke, L. R. 1 Ch. 25.

After carefully considering these authorities, as well as those cited by the respondent, I am of the opinion that the appeal should be dismissed.

To constitute a gift, in the absence of a deed, the donee must be placed in possession of the article given. The reason for this rule is the inability of Courts to enforce an executory agreement made without consideration. If the donee is not in possession of the property, the Courts are helpless to insist on its delivery.

The piano in question was purchased as a present for plaintiff. The evidence on the point being somewhat obscure, I assume, what is most favourable to defendant, that it was sent to Mr. D'Aoust's home as his property, and that the gift and acceptance found as a fact by the trial Judge took place thereafter.

Until plaintiff's marriage it remained in the house occupied in common by plaintiff and her father.

The present appears to be a repetition of the cases of Winter v. Winter, 4 L. T. 639, and Kilpin v. Ratley, [1892]

1 Q. B. 583. Until the gift the legal possession was in the father, although the actual possession was common to both. By the gift he transferred the legal title to the plaintiff, and she, being in actual possession, although then only as agent, became the full legal owner. Being in actual possession and assenting to the gift, as found by the trial Judge, she became fully possessed in her own right. It was unnecessary to ask assistance from the Court to complete the gift, because she had all she could get, possession with the assent of the recent owner that that possession should be absolute and for her own benefit.

Had D'Aoust thereafter removed the piano, legally he would have taken it out of her possession. Upon the principle approved in Winter v. Winter and Kilpin v. Ratley, the appeal should be dismissed with costs.

MANITOBA.

MATHERS, J. MAY 22ND, 1907.

CHAMBERS.

RAT PORTAGE LUMBER CO. v. EQUITY FIRE INS. CO.

Particulars — Reply — Close of Pleadings — No Necessity Shewn—Grounds for Ordering Particulars—Appeal from Order of Referee.

Appeal by plaintiffs from an order of the Referee in Chambers requiring plaintiffs to give particulars of their reply.

E. Anderson, for plaintiffs.

O. H. Clarke, K.C., for defendants.

MATHERS, J.:—The only material filed in support of the motion is an affidavit identifying the pleadings.

As stated by Boyd, C., in Smith v. Boyd, 17 P. R. 167, "particulars are ordered primarily, with a view to have the prior pleading made sufficiently distinct to enable the applicant to frame his answer thereto properly."

If the pleadings are closed, particulars cannot be required for that purpose. After the pleadings are closed, particulars may, in a proper case, be ordered for the purpose of saving expense: Gourond v. Fitzgerald, 37 W. R. 55, affirmed in appeal, ib. 265, or for the purpose of preventing surprise at the trial: Thompson v. Berkley, 31 W. R. 230.

In this latter case Watkin Williams, J., said: "The proper principle is to order particulars only when, from the nature of the case, they are necessary to limit the inquiry, or are necessary by reason of matters brought forward on affidavit. Here, there is nothing of the sort. If the defendant had shewn that he would be placed at a disadvantage by not having these particulars, then he would lay a foundation for his application."

The above language is quoted with approval by North, J., in Sachs v. Speilman, 37 Ch. D. 305.

In Bank of Toronto v. Insurance Co. of North America, 18 P. R. 27, Rose, J., refused to order particulars after the pleadings were closed, on the ground that necessity for particulars are not shewn. He pointed out that, as the pleadings were closed, particulars were not required for the purposes of pleadings, and there was no evidence that they were required for the purposes of the trial.

The practice is well settled that, to justify an order for particulars after the close of the pleadings, it must be shewn by affidavit, or otherwise, that they are necessary for the purpose of saving expense or preventing surprise at the trial. Such an order should not be made as of course.

In the present instance no such case is made out. I think, therefore, the learned Referee erred in making the order.

I recognize fully the impropriety of lightly interfering with the discretion exercised by the Referee, and, had there been any attempt made to make out a case of necessity or any facts in evidence from which a necessity for the order might be reasonably inferred, I should not interfere.

With deference to the Referee, I think the order he made is contrary to the established practice.

The appeal must be allowed and the application to the Referee dismissed, with costs in the cause to plaintiffs in any event.

MANITOBA.

MATHERS, J. MAY 13TH, 1907.

TRIAL.

LONDON GUARANTEE AND ACCIDENT CO. v. CORNISH.

Principal and Surety—Guarantee Bond—Counter Security Bond—Construction—Fidelity of Municipal Treasurer—Application to Past Default—Consideration — Continuance of Original Guarantee—Authority of Manager of Guarantee Company—Recitals—Indemnity.

Action on a bond given to plaintiffs.

C. H. Campbell, K.C., A.-G., and H. P. Grundy, for plaintiffs.

T. R. Ferguson, I. A. Mackay, C. P. Fullerton, and W. Monahan, for defendants.

MATHERS, J.:—Plaintiffs are a guarantee company who furnished the security required by the Municipal Act from the various municipal treasurers throughout the province. The security was given by way of a bond to the municipal commissioner, with a schedule annexed thereto, on which was entered the names of the several municipalities and of the treasurers guaranteed, with the amount of the guarantee set opposite.

The bond was dated 1st May, 1904, and the condition was that if each of the said treasurers should faithfully discharge the duties of his office and duly account for all moneys and property intrusted to him by virtue of his office or placed under his control, or if the company should pay to the municipal commissioner the amount of any loss not exceeding in respect of each treasurer the amount set opposite his name, sustained by the municipality in consequence of the failure of the treasurer faithfully to discharge the duties or account for the money or property mentioned, the obligation was to be void.

The bond further provided that if the company should at any time give 3 calendar months' notice in writing to the

municipal commissioner to put an end, in respect of any of the said treasurers, to the guarantee thereby entered into, then the bond and all accruing responsibility on the part of the company should, so far as regards that treasurer, cease and terminate from and after the last of such 3 calendar months, in so far as concerns any acts or deeds of such treasurer subsequent to such determination, the company remaining liable for all or any deeds, acts, or defaults done or committed by such treasurer in his office or employment from the date of the bond up to such determination. And it was further provided that claims upon the company should be presented within 2 years after the treasurer ceased to fill the office if the bond was then in force, or within two years after the expiration or cancellation of the guarantee in respect of that treasurer, otherwise they should not be held to be a claim within the meaning of the bond.

The premium was paid for 3 years to 1st May, 1907, on which date the bond would expire by effluxion of time.

The defendant J. H. Cornish was the treasurer of the municipality of Brokenhead at the time the bond was given, and his name was inserted in the schedule for a guarantee of $3,000.

The company having received, from some source not appearing in the evidence, a report that Cornish was drinking and neglecting his duties, on 3rd March, 1905, Mr. Alexander, the manager for Canada, sent to Mr. Wood, the deputy municipal commissioner, a notice in writing cancelling Cornish's guarantee of $3,000 at the expiration of 3 months from that date, and on 7th March Mr. Wood notified John Little, the reeve of the municipality, of the action taken by the company.

In the beginning of May the municipal inspector examined Cornish's books and found that the cash collected subsequent to 31st December, 1904, amounting to $1,982.33, had not been deposited in the bank where the account of the municipality was kept, and on 15th May he sent his report to the municipal commissioner, in which he stated that Cornish had promised to deposit the cash on hand on the 11th, but up to 3 p.m. on the 12th he had not done so. On 18th May Mr. Wood wrote a letter to the reeve in which he said: "One of our municipal inspectors in reporting his inspection of your municipality reports a shortage of $1,982.33 in the secretary-treasurer's accounts, and affairs in general in a crippled condition. This should have your most prompt

attention." He also again drew the reeve's attention to the fact that the treasurer's bond would expire on 3rd June. The reeve had brought to the attention of the council Mr. Wood's letter of 7th March, and at a meeting held on 26th May it was resolved to find out the company's reason for cancelling the treasurer's bond. The reeve was not present at this meeting of the council, as he had left for Ontario the day after receiving Mr. Wood's letter of 18th May, and I am inclined to believe that it was first brought before the council at the meeting on 10th June, at which the reeve was present. No action was taken upon either letter at this meeting. Mr. Wood had again written the reeve on 8th June, pointing out that the company had cancelled Cornish's bond, and that he must give security by guarantee bond in order to continue in his position. About 14th or 15th June a deputation, consisting of defendant Madden and several others, came to Winnipeg and had an interview with the Minister of Public Works and the deputy municipal commissioner as to the reason for cancelling the treasurer's bond. There is a conflict of evidence as to what took place at this interview, but, in view of the conclusion I have arrived at, it is not necessary to make a finding upon it. It was, however, stated by Mr. Wood that he believed the company would re-instate Cornish if a counter security bond were given, but the matter was left in abeyance until it was ascertained whether or not in that event the council would be willing to retain him. The reeve thought that something was wrong and wanted Cornish dismissed, but he had a great many friends both in and out of the council who wanted him retained, the chief of whom was the defendant Madden. A special meeting of the council was called for the purpose of deciding the question, on 23rd June, and the whole of that day was spent in discussion. Finally upon receipt of a telegram from the Minister of Public Works that the company would re-instate him upon a counter security bond being given, it was decided to re-appoint him. At the request of Councillor Shaw, Mr. Wood procured from the company and sent to him a form of bond to be filled in and executed by the proposed bondsmen. Upon this bond being returned signed by the defendants, it was found to be defective, and another form was sent to the reeve, who procured the signatures of the defendants to it and returned it to Mr. Wood, who on 10th July forwarded the same to the company.

On 15th July Mr. Alexander, the company's manager, acknowledged receipt, saying, "We now enclose you indorsement reinstating the name of Mr. Cornish in the schedule."

The document enclosed was as follows:

"INDORSEMENT ON SCHEDULE BOND 062021.

"Manitoba Government.

"It is hereby understood and agreed that the following addition is made to the schedule under above bond:—John H. Cornish is placed upon the schedule as secretary-treasurer of municipality of Brokenhead at Beausejour (sic), Man., for a guarantee of $3,000 dating from June 3rd, 1905, to May 1st, 1907. Amount of premium is $17.18.

"Dated this 18th day of July, 1905.

"D. W. Alexander,
"Manager for Canada."

On 12th June Mr. Alexander had sent to Mr. Wood a cheque for $17.18, the unearned portion of the premium, and after the receipt of the indorsement Mr. Wood sent that amount back to the company.

The counter security bond recites that "whereas a certain agreement to guarantee dated the first day of May, 1904, made between the London Guarantee and Accident Company, Limited, therein and hereinafter called the company, and the municipal commissioner for Manitoba, acting for certain municipalities in the province of Manitoba, therein and hereinafter called the employers, and the said municipalities, therein and hereinafter called the employers, the company agreed that during any year thereafter in respect of which the company should consent to accept the premium in the said agreement to guarantee mentioned, but subject to the memorandum and articles of association of the said company, and to the conditions and provisions in the said agreement to guarantee contained, which are conditions precedent to the right on the part of the employers to recover under the said agreement, the company will make good and reimburse to the employers to the extent of $3,000, and no further, such pecuniary loss, if any, as may be sustained by the employers by reason of embezzlement or theft of money on the part of the employee in connection with the duties in the said agreement referred to committed during the continuance of the said agreement and discovered during the

continuance of the said agreement, and within 3 months from the death, dismissal, or retirement of the employee.

"And whereas as a condition of the continuance of the said agreement the company have required the said employee J. H. Cornish and the said sureties to enter into this obligation, and they have consented so to do."

The condition so far as material to quote was "that if the said J. H. Cornish and the said sureties or some or one of them shall from time to time and at all times make good and reimburse to the said company any and all sum or sums of money which it may at any time in good faith pay to the employer by reason of any claim made by the employer under the said agreement to guarantee or any renewal or renewals thereof . . . then this obligation shall be void, otherwise the same to be and remain in full force and effect."

It was shortly afterwards discovered that Cornish had misappropriated the funds of the municipality to a large amount, and that over $3,000 of this sum had been taken prior to 3rd June, 1905.

The plaintiffs paid the amount of their bond, $3,000, to the municipal commissioner, and brought this action on the counter security bond against the defendants.

At the time the counter security bond was given, the guarantee bond was at an end so far as Cornish was concerned. It provided that the bond and all accruing responsibility on the part of the company should cease and terminate at the expiration of 3 months from notice to that effect. The notice was given and the 3 months had expired on 3rd June, so that, so far as Cornish was concerned, there was no bond in existence as to anything that might occur after 3rd June. Under the Municipal Act he could not hold the office of treasurer unless secured by a guarantee company. He was, therefore, under the necessity of inducing the plaintiffs or some other guarantee company to rebond him, or to relinquish his office. I do not think that either of the defendants Madden or Campbell then thought that Cornish was a defaulter. They knew that he had been guilty of some neglect of duty and of some irregularities in office, but they did not believe that he had misappropriated any of the municipal moneys. For anything that had been done prior to 3rd

June the liability of the company continued for 2 years, and, when asked if Cornish would be re-instated upon a counter security bond being given, the company did not stipulate that such bond should secure them against the past as well as the future. Mr. Alexander says in his evidence that he did so, but his correspondence cannot be so interpreted. All that the defendants Madden and Campbell and the others who desired to prevent Cornish's dismissal sought to accomplish was his re-instatement on the company's bond in order that he might continue in office. The question of protecting the company against any past delinquencies of Cornish was not, I am satisfied, in the minds of any of the parties, and the company did not suggest that it was necessary to do so before Cornish would be re-instated.

It is to be borne in mind that the guarantee bond was then at an end; that the council had actually appointed another treasurer in Cornish's place; that it was only upon being advised by the Minister of Public Works that, upon his obtaining private bondsmen, his guarantee bond would be renewed, that the council considered the action taken and re-appointed Cornish secretary-treasurer; and that what the company were being asked to do was to in effect give a new bond, and it was liability under this new bond that the company were to be indemnified against.

The condition of the defendants' bond is to be read in the light of these surrounding circumstances, and, if so read, it seems to me impossible to give it a construction which would render the defendants liable for the misappropriation of moneys prior to the date upon which the bond was executed. It is admitted that prior to 3rd June, the date when the guarantee bond terminated, Cornish was a defaulter to an amount greater than $3,000, the amount paid by the plaintiffs. I am, therefore, of opinion that the plaintiffs' action, on this ground, fails.

But I also think that the plaintiffs fail on other grounds. The consideration for the defendants' bond was the continuance of the guarantee bond. The method by which it was attempted to continue it was by the execution by Mr. Alexander of the document previously quoted as an indorsement upon it. There is no evidence that Mr. Alexander had any authority to bind the plaintiffs in this way. The plaintiffs

have, therefore, failed to establish that they continued the guarantee bond; hence there was a total failure of consideration for the defendants' bond.

Again, the bond recited in the defendants' bond, and against liability under which the defendants indemnified the plaintiffs, is not the bond under which the plaintiffs paid, but an entirely different one. The guarantee bond under which the plaintiffs paid was one for three years straight; under it the plaintiffs were liable if Cornish failed to faithfully discharge the duties of his office or to account for all moneys or property intrusted to him, and the company's liability continued for 2 years after the termination of the bond as to defaults accruing before its termination, but no period was allowed for payment after claim made, whereas the bond recited in the counter security bond was one that continued for one year, and so on, from year to year, upon payment of the annual premium, and what was guaranteed against was pecuniary loss from embezzlement or theft of money only committed during the continuance of the bond, and discovered not later than 3 months after its termination, and, in the event of a claim, payment was to be made at the expiration of 3 months after proof of the loss satisfactory to the directors.

It was argued that the identity of the bonds was shewn, and that by an application of the doctrine of the maxims falsa demonstratio non nocet and certum est quod certum reddi potest, the difficulties suggested by the difference in the terms of the two bonds could be got rid of. I do not understand that either of these maxims would justify the Court in making a contract for the parties essentially different from that which they did in fact make. When the defendants executed the bond sued upon, it contained recitals shewing the terms of the bond they were to indemnify the plaintiffs against. Who is to say that they would have executed a bond at all, indemnifying the plaintiffs against liability upon a guarantee bond such as the plaintiffs have proven in this case?

To hold the defendants liable in this case would be to hold them liable upon a contract they did not make.

On all these grounds, therefore, the action must be dismissed with costs.

MANITOBA.

MATHERS, J. MAY 13TH, 1907.

CHAMBERS.

SMITH v. VAN BUREN.

Attachment of Debts—Moneys Payable to Judgment Debtor under Contract for Sale of Land to Garnishee—Assignments of Contract by Garnishee to Third Person—Moneys to Accrue Due under Contract—Effect of Attaching Order.

Motion by plaintiff for an order upon Robert McInnes to pay over to him certain moneys attached in his hands by a garnishing order dated 12th June, 1905.

C. P. Fullerton, for plaintiff.

A. N. McPherson, for garnishee.

MATHERS, J.:—The plaintiff recovered judgment in the action on 18th August, 1905, for $2,006.20, which remains unpaid, except as to $139.25 paid by McInnes, under a previous order to pay over, obtained by the plaintiff.

On 25th January, 1905, McInnes, the garnishee, entered into an agreement to purchase from defendant certain lands in the town of Morden for $7,300, payable $1,500 cash, $400 on 1st February in each of the years 1906, 1907, 1908, 1909; $1,500 on 1st February, 1910; and the balance of $2,700 by the assumption of a mortgage for that amount in favour of the Manufacturers' Life Insurance Company. The agreement contains a covenant by the purchaser to pay the moneys with interest on the days and times and in the manner set out. The moneys attached by the garnishing order were the moneys payable under this agreement, and the order to pay over previously obtained was for moneys payable under the same agreement of sale.

Both parties consented that the matter should be summarily disposed of in Chambers.

The garnishee opposes the order, on the ground that he has disposed of his whole interest in the land to one Thorlakson, and has assigned to him the agreement to purchase, and

that Thorlakson has assumed the payments to fall due thereunder to the defendant.

It was argued that there is now no money owing or accruing due from him to the defendant, and, therefore, an order cannot be made against him. I cannot, however, see that he has thus escaped liability. He still continues liable upon his covenant to the defendant, unless the defendant has expressly agreed to relieve him from such liability, a matter concerning which there is no evidence. Even if the defendant had done so, he could not deprive the plaintiff of the right he acquired at the time the garnishing order was served. It is true that when the order was served there was no money then due and payable from the garnishee to the defendant, but there clearly was money accruing due, and the garnishing order attached all debts, obligations, and liabilities owing, payable, or accruing due from the defendant to the garnishee.

It was argued that to hold the garnishee liable, under the circumstances stated, would be to hamper the sale of property, but, on the other hand, if a garnishee, by the simple expedient of assigning his debt, could escape from all liability to pay over under it, the consequences would at least be equally serious. As a matter of fact, however, no such consequences as counsel for the garnishee suggests would result. He could have stipulated that his purchaser should make the payment under the agreement to him instead of direct to the defendant, or as directed by any order made against him. In this manner he could protect himself and at the same time make the sale.

There is now one payment in arrears under the agreement, and the plaintiff asks that he be given an order for the payment over of this sum, and also the future payments as they fall due, until his judgment is satisfied. I think he is entitled to an order in this form: Rule 764.

I understand that the garnishee is entitled under the terms of the agreement to make certain deductions. If the parties cannot agree on the amount to be stated in the order, they may again speak to the matter. The plaintiff is entitled to the costs of the motion.

MANITOBA.

MATHERS, J. MAY 14TH, 1907.

TRIAL.

KENT v. SPECTOR.

Promissory Notes—Action on, by Curators of Insolvent Estate of Payee—Claim of Set-off—Payments Made by Defendant at Request of Payee—Evidence to Establish.

Action upon promissory notes.

H. A. Burbidge, for plaintiff.

G. R. Coldwell, K.C., for defendant.

MATHERS, J.:—The plaintiffs are the curators of the estate of Casper Spector, who carried on business at the city of Montreal. Prior to 13th October, 1904, he carried on business in the city of Brandon, and on that day he sold his business to the defendant A. L. Spector, and received in payment 8 promissory notes, aggregating $1,387.72. Upon his assignment in Montreal for the benefit of his creditors, he turned over 6 of those notes for $150 each to the plaintiffs, and this action is brought upon them. The notes are admitted, so that the plaintiffs are entitled to judgment for the full amount of their claim, unless the defendant succeeds upon his set-off.

The defendant claims to set off the sum of $978.35, which he alleges he paid, at the request of Casper Spector, before he had any notice that the plaintiffs were the holders of the notes. $600 of this sum he says he sent to one B. Simon in Montreal, $48 he paid to C. Spector just as he was leaving Brandon, and the balance, he says, was paid to various tradesmen and others in the city of Brandon.

At the conclusion of the case before me, it was admitted by counsel for the defendant that the evidence of the payment of the several sums alleged to have been paid at Brandon was insufficient; that witnesses had not been brought to establish these amounts on account of the great expense that would be involved in bringing witnesses from Brandon to Winnipeg; and he requested that this part of the case be re-

ferred to the local Master at Brandon. I accordingly pronounced judgment referring to the local Master at Brandon "the question of what payments, if any, were made by the defendant at the request of his brother Casper Spector to the creditors of the latter after 12th October, 1904," and that the said Master report his findings as to the same, together with the evidence, and reserved further directions and costs until after the receipt of his report.

By his report the local Master finds that the following sums were paid by the defendant to creditors of C. Spector, namely: Brandon Electric Light Co., $21.60; the City of Brandon, $33.50; Benj. S. Spittle, $5; the Jewish Rabbi, $5; but he does not find that the payments were made at the request of C. Spector, and says that he was unable from the evidence to do so. He further finds against the claims of Abram Friedman, $25.50, and Peter Crystal.

The local Master had not before him the evidence of the defendant, who swears that these payments were made at the request of C. Spector, and I am asked by counsel for the defendant to find that fact in his favour.

The sum of $600 alleged to have been paid by the defendant to B. Simon, at the request of C. Spector, was made in 3 separate payments. The first consists of a draft in favour of B. Simon for $350, dated 8th November, 1904; the next was a draft for $150, dated 18th November, 1904; and the last was a cheque of the Montreal Fur Company in favour of B. Simon for $100, dated 29th November, 1904.

According to defendant's evidence, he was, the night the agreement of sale was entered into, requested by C. Spector to send $600 to B. Simon as soon as possible, and promised that he would then return to him $600 in value of the notes. He also swears that C. Spector requested him to pay his Brandon debts. He also swears that it was C. Spector's intention to return to Brandon in a short time and enter into business again, and he did not know that C. Spector was then in financial difficulties. He further deposes that just before C. Spector left he paid to him $48 in cash after the notes had been given, and he explains that it was not indorsed upon the notes because C. Spector had them locked away in his trunk. C. Spector was examined as a witness under commission in Montreal. He says he did not request the defendant to send $600 to B. Simon, and that he knows nothing about that transaction. He does not remember

whether he requested defendant to pay his debts at Brandon. He thinks he probably did get the $48 when he was coming away. Attached to the agreement of sale is a document shewing how the amount of the sale price and of the notes to be given was arrived at. This document contains a memorandum shewing certain outstanding bills that the defendant was to assume and pay, and the amount of which are deducted from the value of the stock. And there is a further deduction of $1,409 cash, leaving a net balance of $1,387.72. It seems to me incredible that the parties did by writing arrange for the payment of certain debts of C. Spector that were to be assumed by the defendant, and make no reference in the document to others which it is alleged were also to be paid by defendant, and for which he was to get credit. It seems also to me improbable that C. Spector would arrange to leave Brandon, having closed out his business with the defendant. and only at the last moment, after he had the notes securely locked away in his trunk, discover that he had no money wherewith to purchase a ticket and have to borrow $48 for that purpose. The defendant says that C. Spector intended to return to Brandon. C. Spector himself flatly contradicts that statement, and says that he did not intend to return. He also says that he was in financial difficulties and that everybody was after him. I cannot believe that the defendant was not aware that such was his financial condition.

None of the sums going to make up the $600 paid to B. Simon were paid by A. L. Spector. The drafts bought at the bank were bought by Max Davidson, manager of the Montreal Fur Company, and the cheque of $100 was a cheque also of that company. Davidson says that he bought those drafts with moneys furnished him by the defendant, and that he sent this cheque at the request of the defendant. There is no question at all but that this money was sent to B. Simon, but whether it was sent by the defendant on his own account, or by Max Davidson on his account, or by the defendant at the request of C. Spector, I am unable to find.

The defendant and his brother C. Spector appear to have been friendly. B. Simon was not called as a witness. He is a nephew of the defendant and of C. Spector. It is said that he could not be found, although he was seen a short time prior to the execution of the commission. His evidence would have cleared up the mystery as to the $600, and I am not satisfied that the defendant could not have procured it

had he sincerely wished to do so. No motive for C. Spector swearing to what is false is suggested.

On the whole I am not satisfied with the evidence in support of the defendant's set-off, and I therefore hold that it has not been established.

There will be judgment for the plaintiffs for the full amount of their claim and costs, and I dismiss the counterclaim with costs.

MANITOBA.

MATHERS, J. MAY 20TH, 1907.

CHAMBERS.

LEVI v. PHOENIX INSURANCE CO. OF BROOKLYN.

Parties—Joinder of Defendants—Action Brought against two Insurance Companies upon Separate Policies for Loss Sustained by one Fire—Separate Causes of Action—Election of Plaintiff against which Company to Proceed—Form of Order.

This action was brought against the Phœnix Insurance Co. of Brooklyn and the Rochester German Insurance Co. of Rochester.

In September, 1906, the Phœnix Insurance Co. issued to plaintiff a policy for $2,500 on the furniture and stock usually carried in her business, and in the same month the Rochester German Insurance Co. issued a policy to plaintiff for $2,000 on the same furniture and stock. In October, 1906, the premises were burnt and the stock injured or destroyed.

Plaintiff brought this action to recover $3,705 with costs.

Defendants the Phœnix Insurance Co. of Brooklyn moved before the Referee in Chambers for an order to set aside service of the statement of claim on the Phœnix Insurance Co., or for an order striking out the Phœnix Insurance Co. as a party, on the ground that the causes of action, if any, which the plaintiff had against the defendants in this suit

were separate and distinct, and that the action was based on separate insurance policies, and that the contract with the defendants the Phœnix Insurance Co. was separate and distinct from the contract with the Rochester German Insurance Co.

The Referee made an order that the plaintiff should have 5 days within which to elect which defendant she would proceed against, and that on her election the action be dismissed as against the other defendant with costs, and that the plaintiff be at liberty to amend the statement of claim as she might be advised.

Plaintiff appealed from that order.

H. A. Burbidge, for plaintiff.

E. Anderson and D. A. Stacpoole, for defendants.

MATHERS, J.:—It is, I think, clearly established by authority that Rule 219 does not authorize a plaintiff to bring before the Court in the same action different defendants, when the real causes of action that exist against them are separate: Faulds v. Faulds, 17 P. R. 480; Quigley v. Waterloo Manufacturing Co., 1 O. L. R. 606; Hinds v. Town of Barrie, 6 O. L. R. 656, 2 O. W. R. 995; and Andrews v. Forsythe, 7 O. L. R. 188, 3 O. W. R. 307. The action in this case is brought against two insurance companies upon separate and distinct contracts of insurance. It is true both policies relate to the same subject matter, and the liability of each defendant arises, if at all, from the same fire, but otherwise they are not related.

Under the circumstances it does not appear to me that the plaintiff can get relief against the defendants, either jointly, severally, or in the alternative; or that the presence of either defendant before the Court is necessary in order that relief may be had against the other. It was argued that the evidence against each defendant would be largely the same, and, to some extent, that may be true, but, . . . although there may be some evidence common to each, every good purpose will be attained by seeing that the cases are tried at the same time.

I think, therefore, the learned Referee was right in refusing to allow the plaintiff to proceed in the one action against both defendants.

It seems to me, however, that the order was not in accordance with the practice. The dismissal of the action against one defendant might hamper the plaintiff in again proceeding against that defendant.

The proper order was made in Hinds v. Town of Barrie, 6 O. L. R. 656. The plaintiff should elect within 5 days as to which defendant she will proceed against in this action, and should then discontinue against the other, or the name of the other should be stricken out of the proceedings. The order of the Referee will be varied accordingly.

As the applicant defendants substantially succeed, I think they should have the costs of the appeal in the cause in any event. The other defendants should get the costs of an attendance on the appeal in he same way.

MANITOBA.

PHIPPEN, J.A. MAY 21ST, 1907.

TRIAL.

REX v. GAGE.

Criminal Law—Conspiracy—Trade Combination—Criminal Code, sec. 498—Construction of—"Undue" Restraints—Conditions Governing Grain Trade of the West—Grain Dealers' Associations—By-laws, Regulations, and Agreements—Restraint of Trade—Regulation of Prices—Pooling Receipts—Commission Rule—Appreciation of Evidence.

The defendants stood indicted for conspiracy under sec. 498 of the Criminal Code. That section is as follows:—

498. Every one is guilty of an indictable offence and liable to a penalty not exceeding $4,000 and not less than $200, or to two years' imprisonment, and if a corporation, is liable to a penalty not exceeding $10,000 and not less than $1,000, who conspires, combines, agrees, or arranges with any other person, or with any railway, steamship, steamboat, or transportation company:

(a) To unduly limit the facilities for transporting, producing, manufacturing, supplying, storing, or dealing in

any article or commodity which may be a subject of trade or commerce; or

(b) To restrain or injure trade or commerce in relation to any such article or commodity; or

(c) To unduly prevent, limit, or lessen the manufacture or production of any article or commodity, or to unreasonably enhance the price thereof; or

(d) To unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation, or supply of any such article or commodity, or in the price of insurance upon person or property.

R. A. Bonnar, J. E. O'Connor, and H. P. Blackwood, for the Crown.

J. A. M. Aikins, K.C., T. Robinson, A. J. Andrews, and H. A. Burbidge, for the several defendants.

PHIPPEN, J.A.:—It is apparent from the reading of the Act that sec. 498, sub-sec. (b), covers as a generality the same ground which sub-secs. (a), (c), and (d) cover specifically, yet under sub-secs. (a), (c), and (d), to constitute an offence, the restraint must be "undue," while sub-sec. (b) contains no limitation. To construe (b) in its literal sense would mean that under one part of sec. 498 the doing of an act, without more, is punishable, while under another part of the same section the same act is only an offence if done unduly—a legal condition it is impossible to attribute to the intention of Parliament.

Such a construction of sub-sec. (b) would constitute the most ordinary and natural understanding for business protection, or the advancement of common interests, a crime. An agreement for the exclusive agency of a manufactured commodity would amount to a restraint of trade, subjecting the contracting parties to the penalties provided by the section. It is evident no such condition was contemplated, and some other reasonable solution must be found.

I am inclined to the opinion which seems to have been adopted by Chief Justice Killam, in Gibbins v. Metcalfe, 15 Man. L. R. 583, 23 Occ. N. 308, 1 W. L. R. 139, that sub-sec. (b) relates to those restraints which are not justified by any personal interest of the contracting parties, but which are mere malicious restraints, unconnected with any business relations of the accused. No such case was attempted to be made under this present indictment. All restraints

suggested by the evidence were agreed to, whether justifiably or not, as business regulations. Before finding the defendants guilty, these restraints must, in my reading of the section, appear to be "undue."

The evidence offered, apparently with the consent of counsel for all interests, assumed the form of an investigation of the conditions governing the grain trade of the West, rather than a trial of the charges specified in the indictment. Yet, as in a large sense the guilt or innocence of the accused is interwoven with the subject of the inquiry, I feel called upon to treat the matter somewhat broadly, rather than to conclude it by a decision based only upon narrow, technical, and strictly legal grounds,

My duty is much lightened by the somewhat unusual circumstance that, although the trial lasted many days, it concluded with absolutely no conflict of evidence on material points. The testimony of all the witnesses, whether those who, from their interests, might be expected to favour the prosecution or the defence, was in strict accord, and I can, therefore, have no hesitation in accepting it as the simple truth. For the purpose of clearness I propose to discuss the evidence without special reference to any existing distinction between those associations with which the defendants, or some of them, have been connected, namely, the Winnipeg Grain and Produce Exchange, the Grain Dealers' Association, and the Elevator Companies' Association.

The case for the Crown is that certain by-laws and regulations of some of these associations, and certain agreements between some of the subsidiary interests, amounted to a restraint of trade, for which these defendants are criminally responsible. That they did in some sense amount to trade restrictions I expressed myself at the close of the trial as having no doubt. It is not every trade restriction, however, which is criminally punishable, not every trade restriction which is even vicious. As life can only be sustained by the destruction of life, so, paradoxical as it may appear, is the life of trade dependent upon its own impairment. And, as the right to protect individual life has at all times been universally recognized, so must we respect the right of a particular trade or business, of a particular class of traders, to protect their property by regulations and agreements, so long as the public interests are not thereby unduly impaired.

This is the true field for legislation regulating trade restrictions. It is the only field, to my mind, Parliament has attempted to occupy, and the issue raised before me is not whether the grain interests of the West, in their effort to carry on a legitimate business, have done anything which might be considered a trade restriction, but whether, regard being had to existing conditions, they have, to the undue public detriment, erected barriers to the fair, free, and natural competition of commerce.

The natural conditions pertaining to the grain trade in Manitoba are a duplication of those existing in every considerable export market. Grain is primarily collected at transportation points convenient to its natal district. What is not required for strictly local consumption is forwarded to some collecting centre—in this particular case, to the head of lake navigation at Fort William or Port Arthur. Toll is taken in its progress to meet the requirements of the larger milling companies, and the remainder is stored till the convenience of transportation and the requirements of foreign markets determine its destination and the time of its shipment.

There is one feature of the grain trade which is largely overlooked. While the crop matures at practically a common date, its use is necessarily distributed throughout the succeeding year. With manufactured articles this is not ordinarily so. On a normal manufacturer's market the consumers' demand should keep abreast of production.

Between the crop production and its consumption a very large portion must be carried for a considerable time in store by the dealers. The exigencies of the grain grower require an immediate cash market for at least a material part of his output. The farmer must sell a long way ahead of the requirements of consumption. Meanwhile, owing to uncontrollable world-wide influences, the value of the commodity is necessarily speculative.

The enormous and increasing amount of money required to handle our crop can be inferred from Mr. Horne's evidence. From 1st September, 1905, to 31st August, 1906, he inspected of wheat alone at Winnipeg, 61,542 cars, or nearly 65,000,000 bushels. This did not include wheat grown east of Winnipeg, wheat which found its way to the world's markets via Duluth, or wheat used by interior mills. Assuming it to be of the average value of 75c. a bushel at

Fort William, this means a lock-up for a part of the year at least, for a considerable part as to a portion, of an aggregate of between $45,000,000 and $50,000,000, practically all of which must be provided by the dealers. As a natural sequence the dealer must so conduct his business as to command the confidence of the financial institutions of our country, and to attain this end he must eliminate so far as possible the element of speculation. A small and certain profit is a better banking asset than the possibility of a large but entirely speculative return.

The only means as yet devised to eliminate the element of speculation is the option market. The dealer can then use the speculator as the insurer uses the underwriters at Lloyds, to relieve him of a large part of the uncertainty incident to the trade, and, by future sales against his cash purchases, bring himself within the reasonable purview of business banking, and so alone obtain that financial credit necessary to take care of the crop under conditions which make possible to the farmer a ready market at its fair and legitimate value.

The common storage point naturally becomes the basis of sale and so of value. Primarily grain is largely purchased at the interior points of production, but it must there be bought on a value relative to that at its common storage centre, the difference or spread depending largely on transportation conditions. It is usually in the first instance bought either on street or on track. Street purchases are those made from the farmer's waggon; track purchases where the grain has actually been loaded into a car.

As grain is bought in the interior on the basis of its estimated value when it reaches Fort William, its interior worth is necessarily a matter of some calculation. Upon conditions which, with normal crops, must at all times prevail to a greater or less extent in the West, it is a matter of speculation to the buyer when he can obtain delivery at Fort William, when it will first attain its true market value. Under ordinary circumstances this speculative element is slight, as it depends, except for a short period each year, upon conditions which experience has reduced to a practical certainty. Such a speculative element as it is, however, must be provided against by the buyer.

There is one period of the year when these speculative conditions are of moment. When the purchasing season has

advanced to that point when it is doubtful if cars can be got to forward the grain before navigation closes, it becomes a somewhat nice point as to when one must cease buying it on a lake and rail basis. The time does come each year when a bushel of wheat on track is worth more than a bushel of similar wheat on the street, because the one can and the other cannot be got forward for that season's lake freight. Thus it is that for a period during each year the street prices when compared to track would appear unduly low. At certain seasons of the year a car at the disposal of a shipper for loading purposes means just so many cents a bushel added to the value of the wheat it will carry.

Parliament to equalize car distribution has provided a system which places each individual farmer in as favourable a position as an elevator owner. A book is kept at each station which any one requiring a car may sign, and cars must be distributed in rotation of signing, one to each, so that a large portion of the crop is now moved by platform loading by the farmer direct.

A farmer may dispose of his wheat in several different ways. He may load it on a car direct, and then either sell it as track wheat or send to Fort William, selling it on arrival as cash wheat. He may store it in an elevator under charges which are subject to government regulations, and thence load it on track, or he may sell it from his waggon as street wheat.

Wheat is a commodity of exact values. If two buyers compete in the same local market, an advance of 1-8 of a cent a bushel by one, unmet by the other, would secure all wheat offered, delivery conditions being equal or nearly so. It is a commodity which requires a quick market. It is in the public interest that dealers should congregate at some central point where market information is accumulated, and which affords easy and free inter-communication, that they should be governed and their business regulated by rules securing uniformity of trade, that the market should be conducted so as, so far as possible, to eliminate the element of speculation amongst dealers by allowing hedging of purchases to the establishment of a business which may be conducted on a safe but narrow margin. It is because of these conditions we find exchanges established at all large trading centres, and, doubtless, some such considerations led to the incorporation of the Winnipeg Grain and Produce Exchange.

The Winnipeg Grain and Produce Exchange was incorporated in 1891 by Act of the local legislature, 54 Vict. ch. 31. Its objects are declared to be:—

"(a) To compile, record, and publish statistics, and acquire and distribute information, respecting the produce and provision trades, and promote the establishment and maintenance of uniformity in the business, customs, and regulations among the persons engaged in the said trades throughout the province.

"(b) To provide and regulate a suitable building or room for a Grain and Produce Exchange and offices in the city of Winnipeg, and encourage the centralization of the produce and provision trades of the said city thereat; to promote the establishment and maintenance of uniformity in the business of its members and those dealing with them; to compile, record, and publish statistics respecting the same; to promote the observance of such regulations and requirements as may be by by-law established, not being contrary to law; and to adjust, settle, and determine controversies and misunderstandings between persons engaged in the said trades, or which may be submitted to arbitration as hereinafter provided; to which ends the said corporation is hereby empowered by vote of the majority, at any annual, quarterly, or special meeting of the association, to make all proper needful by-laws for its government," etc.

The prosperity of the Exchange has kept pace with the increased crop production of the West until a very large grain business is now transacted on its floors, and nearly all of the western dealers of importance are its members or associates. It receives telegraphic reports of the markets of the world and of conditions and estimates of interest to dealers. This information it disseminates without stint through the newspapers and the freedom of its exchange. It has passed rules regulating the dealings of its members, looking to the promotion and systematization of trade and the speedy and economical settlement of disputes. By its by-laws it has apparently endeavoured to eliminate speculation and establish a narrow but stable margin of profit affording facilities to the borrower, permanency and security to the dealer, and the fullest value to the grain grower.

This brings me to the consideration of the conspiracies alleged. One of the by-laws of the Exchange was enacted for the purpose of putting the grain business on a basis of a cent a bushel profit, neither more nor less, from the time

it was purchased, either on street or track, until it was taken off the western market by sale to the miller or the exporter. Of the reasonableness of this profit there is no question. The Crown's witnesses, without exception, agreed that it was as small as would enable the dealer to do business and live, and in the Gibbins case Chief Justice Killam has upheld this same by-law and declared it both fair and just. His judgment was afterwards affirmed by the unanimous opinion of the Court of King's Bench in banc, 15 Man. L. R. 583.

The by-law was attempted to be rendered effective by a later amendment, and by agreements and arrangements between the members of the Exchange. It originally prohibited members from buying wheat at a price which would not shew one cent between the price paid for its then value, on Fort William basis, and wheat could not be sold on commission at less than one cent a bushel.

In the strife to buy track wheat, it was found that members were employing agents at small points at what was practically a division of commission. It was felt that if this was not discontinued it would make such serious and unnecessary inroads on the commission returns as to prevent members doing business on the one cent margin. The commission by-law was then amended to prevent the members from employing a buying agent at a market which was too narrow to justify paying him a salary of $50 a month. This resulted in a large number of agents being discontinued at the smaller points and secured a greater portion of the one cent a bushel to the members of the Exchange. It did not, however, according to the unanimous evidence, in any way affect the price to the farmer. It did not increase to the slightest extent the profit to the dealer, except in so far as it cut his expenses. It did not materially lessen the convenience of the local market to the producer. It was passed for the supposed furtherance of the business of the Exchange, and without any intent to lessen, and in fact it did not lessen, the profits to any other than the employees of its members.

Track wheat could be bought at any time and at any place at a price which would shew the one cent profit. As the value of wheat was constantly fluctuating during the open hours of the Exchange (9.30 a.m. to 1.15 p.m.), persons having a car of track wheat to sell could obtain a quotation from a member or several members of the Exchange

by wire, and before accepting obtain a further and later quotation from another member. If meanwhile prices had advanced even fractionally, the later quotation would be accepted, but if the reverse, the original offer was taken. In other words, it was found detrimental to their business to give what was practically a temporary option during the active hours of the market by attempting to buy car-loads of wheat at country points by telegraphic communication. It was, therefore, agreed that while the freedom of the market should at all times be open to a person having track wheat for sale, offers would not be made to buy at country points during the market hours, but that the closing prices would be immediately wired to all points until the following market opening. To avoid expense of duplicating messages, and to insure the prompt receipt of market quotations at country points, Mr. Fowler, the secretary of the North-West Grain Dealers' Association, was employed to wire this price at the close of the market. There is no question but that this was fairly done, nor is there any suggestion that the price wired was not only just, but was the highest price that could then be paid for grain based on Fort William values. To my mind, this arrangement was not only a reasonable business protection, but was entirely unobjectionable from the grain growers' point of view. The country wheat owner could always ascertain the exact value of his commodity, that is, the value at Fort William, either by telephone or wire, or from the daily papers, and, deducting the freight rate, he knew what the track value should be. He could either let the car go forward and sell it on its arrival at Fort William as cash wheat, in what the witnesses say is the best market in the world, and at what was at all times, according to the evidence, absolutely the full value of the grain; he could send his bill of lading to Winnipeg and sell it either during or after market on the Fort William basis; or he could wait and sell at the closing price of the day to the local agent of any dealer, and in so doing he would receive what the miller or exporter could afford to pay for Fort William wheat in lots of market size on the same basis of delivery, less actual cost of transportation and less the one cent commission for sale.

I find that there was no agreement between any parties to abide by street prices. There were meetings at which the average cost of handling wheat from street to car was discussed, and it was agreed, regard being had to all cir-

cumstances, that the average cost of maintaining the elevators was a little over 3 cents a bushel on the average wheat handled. It was stated by all the Crown's witnesses who testified on the point that this figure did truthfully represent the actual cost. It was also discussed, and I think practically agreed, that a fair and convenient method of ascertaining the street value would be to deduct 3 cents and the fraction (whatever the fraction might be) from the track price, assuming the street wheat could go forward for like delivery with track. Otherwise, what was its equivalent, to base it on the month when the street wheat might reasonably be expected to become cash wheat by delivery at Fort William. If this evidence is true, and, as it is from the Crown's own witnesses and without dispute, it must be accepted, it left a profit of one cent only on street wheat, disregarding, of course, any speculative advances or reverses due to subsequent market changes not covered by hedging sales, and disregarding also variations in forwarding conditions either for or against. As fractions both up and down were disregarded, Mr. Fowler was employed to send out quotations by advising of each one cent variation only.

As a matter of fact, these prices were constantly broken by increases, but, even assuming them to have been adhered to, I fail to see in them more than reasonable business regulations. Certainly on the uniform evidence nothing unreasonable or undue. In all of these it was stated by each of the witnesses who testified on the subject that prices to the public were in no wise affected, the market was not narrowed, and convenience of delivery was not lessened. If this uncontradicted evidence be true, and it was not otherwise suggested, the public was not concerned in the limitations, which amounted to no more than private and internal business arrangements. So with the 5,000 bushel purchasing limitation.

Certain elevator companies decided as a matter of individual management, during a portion of one or two years, not to have more than 5,000 bushels of purchased wheat on hand in any one elevator building at any one time during that portion of the season when wheat was bought to go forward on a lake and rail basis. The reason for this was that owing to traffic conditions it was doubtful when street wheat could be routed. To be compelled to carry it until the following season, if bought on the basis of going forward during the purchasing season, meant a considerable

loss. To provide against a considerable depreciation owing to a quantity of wheat being left on their hands in the interior, yet not to keep entirely out of the market, some of the companies decided to limit the amount of their street purchases. Of this no one could complain. The limiting companies sent their wheat forward as quickly as possible, and reductions in the 5,000 bushel limit were at once filled by new purchases. As soon as wheat went on a winter basis the limitations were removed. That this was unobjectionable is too apparent to require discussion.

Lastly, that some of the elevator companies pooled receipts at certain points. The construction of great additional railway mileage, with its increased number of loading centres and lessened territory tributary to the older ones, coupled with the present facilities for platform loading, has left many stations with much too great elevator capacity. The companies found it necessary to cut down expenses or increase the elevator charges. To enable the former course to be adopted, it was agreed between a number of the companies and adhered to for a couple of seasons, although abandoned before this prosecution, that at certain points elevator receipts should be equalized by an arbitrary payment of about 2 cents a bushel on a clearing house system. There is no question, on the evidence, that the public was not affected by the arrangement. It enabled the companies to reduce expenses and take off street buyers, but it in no way lessened the price paid. When a farmer brought his load to market, there was not quite so much surface activity in the effort to buy, but there was none the less a free market at the old price; the full market value of his commodity, less the one cent a bushel. Neither were storage charges increased.

As I must determine whether or no the evidence discloses any undue restraint, I must consider the question at large. I must confess, after what I had read during the last several years, I approached the trial of this cause quite prepared for disclosures of methods inimical to the public interests. I felt too that where the control of a great market had passed into the hands of a comparative few, its management became impressed with a great public trust. While the public good impels the eradication from such institutions of all that works to the people's detriment, it is equally of public interest that our market be neither traduced by its enemies nor wrecked through a misunderstanding of those

economic conditions for the continuance of which it is a public necessity. At the trial counsel for the Crown were, therefore, given the widest latitude in their inquiry. The whole question was investigated practically without restriction. Yet, with all the evidence before me, I am forced to the opinion that not only was no undue restraint of trade disclosed, but that the very acts complained of, taken in connection with their surrounding conditions, made, on the whole, for a more stable market at the fullest values, and so for the public good.

The gravamen of the whole charge hangs on the commission rule. Doubtless, if it was abrogated, some business would be temporarily done at less than one cent a bushel profit, but for how long? Witnesses all agreed that this was the lowest profit on which the business could live. Such a change must result in unsettled conditions, conditions which, while temporarily profitable to the wheat grower, would inevitably end in an erratic and unstable market. As conditions are now, according to all the evidence, Fort William prices are the highest the world's markets can justify, and these are the prices, less necessary freight rates, storage, and carrying charges, and less one cent a bushel as the dealers' profit, which the farmer actually receives for his grain.

The safeguard to the grain grower, and to me it appears a very real and permanent one, is the impossibility of preventing the freest competition between the millers and the export purchasers. With the export market settled at its full value, and with equivalent comparative local prices assured to the farmer by our present system of car distribution and loading, it would appear in the interest rather than to the detriment of the grain growers of our country that the intermediate profits between the grower and the exporter should be taken care of by a fixed, certain, and reasonable commission, rather than that the market should be destroyed, the legitimate dealers' credit impaired, and the grain trade of our great Canadian West made sport for speculators.

For these reasons I find there was no undue restraint. Under my construction of the statute, no evidence was offered to support the first and second counts in the indictment.

The defendants are not guilty.

MANITOBA.

RICHARDS, J.A. MAY 29TH, 1907.

TRIAL.

MITCHELL v. CITY OF WINNIPEG.

Highway — Obstruction by Building Materials — Injury to Bicyclist—Negligence of Municipal Corporation—Notice of Claim—Letter to Chairman of Board of Works—Sufficiency —Receipt by Clerk—Contributory Negligence — Knowledge of Obstruction—Relief over against Owner of Land Obstructing Highway—Independent Contractor—"Premises."

Plaintiff sued to recover damages for injuries received. He was riding on a bicycle from Salter street over the overhead bridge, in the city of Winnipeg, and on descending to the road leading to Logan avenue he found the road out of repair and obstructed by lumber and building material. In his endeavour to avoid a collision with a vehicle driven from Logan avenue, he was thrown violently from his bicycle and sustained severe injuries. He suffered great pain, and was confined to his bed for a considerable time, and incurred expense for medical attendance and nursing. He claimed $600 damages. The defendants denied any liability, and alleged that plaintiff had been guilty of contributory negligence.

By order, F. M. Luce, the owner of the property outside of which the obstruction was placed, was made a third party to the suit, so that the question of his liability for the damages might be settled in case the plaintiff obtained a verdict against the defendants.

R. M. Dennistoun, for plaintiff.

T. A. Hunt and E. R. Levinson, for defendants.

T. R. Ferguson and I. A. Mackay, for third party.

RICHARDS, J.A.:—At the southerly end of the overhead bridge, crossing the Canadian Pacific Railway Company's tracks in Winnipeg, there is a wooden structure leading southerly and downward, from the bridge to the ground level, the grade being about 5 in 100. This wooden structure, which I shall refer to as "the incline," reaches the

ground level a little to the north of the northerly limit of a public lane, running east and west, behind lots which front on the northerly limit of Logan avenue. A street about 30 feet wide (which I shall refer to as "Salter street") runs from the southerly limit of the incline to the northerly limit of Logan avenue, and is the roadway by which persons coming south over the bridge get from the incline to Logan avenue.

Frederick Luce owned the lot on the north-west corner of Salter street and Logan avenue, and had a building on its end next to Logan avenue. Bussey & Johnson contracted with him to extend the building to the rear of the lot, and, in connection with such extension, to excavate a cellar on the lot back to the lane on the north. Bussey & Johnson, pursuant to their contract, made this excavation to the westerly limit of Salter street, and to the southerly limit of the lane. On the west side of the roadway of Salter street, and towards the north end of the lot, they, or their sub-contractors, placed materials, to be used in constructing the extension of Mr. Luce's building. The part of the roadway left unobstructed by such materials was so narrow that, when a waggon would pass the materials, it and the materials, between them, took up the whole width of the roadway. As the materials were used they were replaced by others which were also left on the street; but, allowing for such changes, materials were so left on the street for a number of weeks prior to 4th October, 1905, and the proper city officials also had actual notice that materials were so kept on the street.

The contract provided that, on the happening of certain contingencies, Mr. Luce should be at liberty to terminate the employment of the contractors for the works, and to enter upon "the premises" and take possession, for the purpose of completing the works, of all materials, tools, and appliances thereon, and to employ any other person or persons to finish the works, and to provide the materials therefor.

Mr. Luce became dissatisfied with the contractors, and, under the above provision, terminated their employment and took possession on the afternoon of 3rd October, 1905.

Mr. Luce lived in the building on the front of the lot, and was aware of the materials being upon the roadway of the street, as above mentioned. The excavation which, as above, ran to the street line on its east, and to the lane limit

on its north, was not fenced or guarded in any way, and was between 6 and 8 feet deep.

On the morning of 4th October, 1905, a little before 7 o'clock, the plaintiff, who lived north of the Canadian Pacific Railway tracks, was coming south on a bicycle. He had passed there daily for some time, and was aware that the roadway was incumbered as above mentioned.

When he was part way down the incline he noticed one or two teams, with waggons, turning north from Logan avenue into the narrowed roadway, and saw that he could not pass between these waggons and the obstructions on the street. He at once back-pedalled, in order to stop his bicycle, but the chain came off the sprocket wheel, and he was unable to control the machine, which rushed downwards along the incline. As he came to the lane the first team and waggon had got between him and that part of the lane which runs east from Salter street, so that he had no choice but to run into the materials or turn into the lane running west from Salter street, so as to get room, on the level, within which to stop his wheel. He turned to the west into the lane, not knowing of Mr. Luce's excavation immediately south of it. Owing to the impetus that the bicycle had gained coming down the incline, he was unable to turn quickly enough to keep within the limits of the lane, and the bicycle plunged into the excavation, carrying him with it. He was severely injured and was unable to work for a considerable time, and suffered for a long time from weakness. Apparently, he is not yet restored to his full strength.

A few days later the plaintiff delivered to Alderman Finkelstein, a member of the city board of works, a document, of which the following is a copy:—

"Winnipeg, October 19th, 1905.

"The Chairman of the Board of Works, City of Winnipeg.

"Dear Sir,—I wish to call your attention to an accident that happened to me on the 4th inst., for which I think the city of Winnipeg is liable. I was wheeling to work in the morning at about 10 minutes to 7 o'clock, when nearing the foot of the overhead bridge, on the south end, I found that the passage between the bridge and Logan ave. was more

than half taken up by material to be used in the erection of an addition to Mr. Luce's store on the west corner. These obstructions consisted of a boiler, a large pile of sand, planking, etc. A stream of teams was passing at the time, and a team fully occupied that portion of the passage which was passable, leaving no outlet whatever.

"I turned to run up the small lane which is behind Mr. Luce's store, but found that that too was blocked, and there remained nothing for me to do but either to run into these obstructions or into the cellar which was being dug, and which had no protection in the way of a fence, or anything to serve as a guard at all. I went into the cellar, dropping 8 feet, and landing on my head and shoulders.

"As you will suppose, I received a very severe shaking up, with such injuries as are certified to by Dr. Sugden in the accompanying certificate. I have been under medical attendance for the past 2 weeks, and my doctor informs me that it will be at least 6 weeks before I shall again be fit for work. I was engaged by the Barnett & McQueen Construction Company as foreman at a wage of 45 cts. an hour, but owing to this accident the company have been obliged to put another man in my position.

"I think, dear sir, that you will find that the city of Winnipeg is liable for this accident on account of them allowing Mr. Luce to so obstruct that small passage to the bridge, and also for not causing him to put up some protection for the cellar which he was having dug.

"I consider that $350 is a low estimate of the cost of this accident to me, and I therefore make application to the city of Winnipeg for reimbursement for this amount, and I shall be greatly obliged if you will kindly give this matter your consideration, and I believe that you will see that justice is done me in this case.

"I am, dear sir,

"Respectfully yours,

"John E. Mitchell."

It is not definitely shewn how this document got to the city clerk, but on 27th October, 1905, the city clerk enclosed it in a letter to the city solicitor, which the latter received on the 28th October.

Plaintiff brought this action against the city corporation claiming damages to the extent of $600, and the defendants caused Mr. Luce to be brought in as a third party, under the provisions of sec. 728 of the city charter, and asked for a remedy over against him.

Mr. Luce set up that he was not liable, because of having employed independent contractors to do the work.

In answer to plaintiff's claim, the defendants pleaded: (a) absence of notice as required by sec. 722 of their charter; (b) that plaintiff was guilty of contributory negligence; and (c) lack of knowledge on their part of the obstructions.

The notice, I think, is sufficient. But I arrive at that conclusion with some hesitation. It is not a notice of action, but it may be treated as a notice of claim, although its wording is rather that of a request than of a demand.

Sub-section (b) of sec. 722 says that the notice must be served upon the clerk. As the clerk received it within a month, I think sub-sec. (b) has been substantially complied with in that respect.

As to contributory negligence, it is urged that plaintiff, knowing of the obstructions, should have foreseen that the coming of a team into the roadway would block all that part of it available for him to pass on, and should have been aware that the chain might come off the sprocket if he tried to stop the wheel by back-pedalling on the incline.

The plaintiff was an experienced bicycle rider, and had used the wheel in question for several years without the chain having ever come off. I think, therefore, that he should not be held responsible for not foreseeing that the chain might come off in such an emergency as that which occurred. It is said that he could have stopped by throwing himself off the wheel. To do so might have been to cause himself injury. As he did not know of the excavation on Mr. Luce's lot, it seems to me that his action was not unreasonable when he tried to turn into the lane. If it had not been for the excavation, that course would have been his safest. I hold, therefore, that contributory negligence has not been proved.

I find for the plaintiff against the defendants for the amount claimed, $600, with costs.

Section 728 of the city charter says that, in case of an action against the city "to recover damages sustained by

reason of any obstruction, excavation, or opening in or near to a public street, placed, made, left, or maintained" by a third party, the city shall have a remedy over against such third party. By sub-sec. (h) of sec. 2 the word "street" includes a lane.

The accident would not have occurred if Mr. Luce had fenced the excavation. Where an owner excavates his land to the street line, a duty is cast upon him to protect the public, using the street, against injuries resulting from the excavation: Barnes v. Ward, 9 C. B. 392; approved of in Orr-Ewing v. Colquhoun, 2 App. Cas. 864.

Where a duty is cast upon an owner to protect against injuries resulting from the work itself, his employing an independent contractor to do the work does not relieve him of liability: Bower v. Peate, 1 Q. B. D. 326; Dalton v. Angus, 6 App. Cas. 829.

Before he took over the contract and materials Mr. Luce knew of the obstructions on the street. It seems to me that, from the time he so took over, he "maintained" those obstructions within the meaning of sec. 728. The contract stated the materials, etc., that he might take over as those on "the premises." But it is evident from the contract that it was intended that, if he took it over, he was to take it as a going concern, including the material brought to the place in connection with it. The word "premises," as used, seems to me, therefore, to include, for the purpose of taking over the materials, the portion of the street occupied by them. The word has received judicial interpretation, shewing it to be somewhat elastic in its meaning. See Regina v. Leith, 1 E. & B. 136, and Taylor v. Brooke, 3 M. & S. 169.

I am of opinion that, in respect both of the excavation and of the obstructions on the street, the defendants have a remedy over against Mr. Luce.

There will be judgment for the defendants against Mr. Luce for their costs of the defence and their costs incurred as a result of making Mr. Luce a party, and for the amount of the plaintiff's judgment against the defendants, including the plaintiff's costs. Such remedy to be enforceable as soon as the defendants shall pay the plaintiff's costs and damages.

BRITISH COLUMBIA.

(VICTORIA.)

APRIL 27TH, 1907.

FULL COURT.

RE HANINGTON.

Physicians and Surgeons—Expulsion of Registered Member of College—Unprofessional Conduct—Intoxication—Evidence—Acquittal by Medical Council—Reversal by Judge on Appeal—Restoration by Full Court—Duty of Appellate Court.

An appeal by Dr. E. B. C. Hanington from an order of MORRISON, J., allowing an appeal to him from the decision of the Council of the College of Physicians and Surgeons of British Columbia refusing to erase the appellant's name from the medical register, and directing that his name be erased because he acted in an unprofessional manner in his treatment of a Mrs. Inverarity.

The appeal was heard by HUNTER, C.J., MARTIN, J., CLEMENT, J.

E. V. Bodwell, K.C., for the appellant.

W. J. Taylor, K.C., for Inverarity, the respondent.

HUNTER, C.J.:—Where the proceedings appear to have been fairly and impartially conducted, and the defendant has been given due opportunity to make his defence, and it is not shewn that the committee or the council have omitted to take something into account which should have influenced their deliberations, or have been influenced by some consideration which ought not to have influenced them, then I think the conclusion of the board ought to be treated with the same respect as the finding of a jury, and that the Court ought not to interfere merely because it may consider that there is a bare preponderance of the evidence the other way, but only when the finding appears clearly wrong. In saying this I do not mean to intimate that if I had to decide the matter as the tribunal of first instance I should

have come to any different conclusion; in fact, as to the main charge, in view of the evidence of Mr. Inverarity himself, I should have thought that it was impossible to contend that it was proved beyond reasonable doubt.

With reference to the interference with the wife's body after death, although it was done not altogether without excuse, common sense should have suggested to Dr. Hanington not to do what he did without first consulting the husband, but, while I think that his conduct in this regard was uncalled for, still I quite agree with the council that it was not such as to call for the extreme penalty of erasure from the rolls, which was the only penalty the council could inflict.

With respect to the charge of neglect, while it may seem strange that both the physicians left the patient for a short time, I am not prepared to maintain against the majority of the council that the patient's chance of recovery was jeopardized thereby, and as far as concerns the excessive use of cocaine, this being a purely scientific question, the Court ought to be slow indeed to interfere with the board's conclusion.

On the whole the general impression that I get after perusal of the evidence is that the appellant, on being confronted with difficult conditions as the case progressed, got rattled, and became unequal to the task before him; but if that alone were a good ground for depriving him of his right to practise, there would be a decimation of the roll.

I think the appeal should be allowed.

MARTIN, J.:—This is an appeal by Dr. E. B. C. Hanington from an order of Morrison, J., directing his name to be erased from the medical register because he acted in an unprofessional manner in his "treatment of Mrs. Inverarity." The learned Judge does not say in what respect he so acted, and therefore it is necessary to go into the whole matter. Our powers in the premises are very wide, including "all the powers which may by this Act be exercised either by the committee or council or the Judge appealed from:" sec. 4, Medical Act, 1898; Amendment Act, 1904. All the evidence before the learned Judge was in writing, as it was, indeed, before the medical executive council, it having been taken by a committee of 4 members, though of the 7 members of the council 4 had been members of the committee and had heard the witnesses. This is important,

for the result of it is, in deciding whether the council was right or wrong, we practically sit in the place of the learned Judge and deal with the appeal as it was open for him to do. We therefore in effect are considering an appeal from the medical council, and, as Lord Davey said, "in every case the appellant assumes the burden of shewing that the judgment appealed from is wrong. . . . ." Montgomerie v. Wallace, [1904] A. C. 73, 83.

A number of charges were brought against the appellant while in attendance upon the deceased; viz.: (1) neglect; (2) unskilfulness; (3) insobriety; (4) excessive use of cocaine and ether; (5) improper use of instruments, or, more correctly, an unskilful use of proper instruments; (6) opening the body of the deceased and removing the dead child therefrom without the consent of her husband; (7) concealing the true cause of death; and others not necessary, in view of the lack of evidence, to particularize.

With respect to numbers 2, 4, and 5, it seems to me that it is very doubtful if, standing by themselves, and apart from, say, drunkenness, they, in a case like the present, come within the expression "unprofessional conduct in any respect," as used in sec. 35 of the Act of 1898, on which our jurisdiction is founded. If a medical practitioner uses his knowledge and skill to the best of his ability, and fails in his object, I cannot see how that is to be considered as "unprofessional conduct," at least in the way the statute employs the term. He may make a mistake and exhibit such a lack of ordinary skill in attending to a patient as to render himself liable to an action, but that surely is not "unprofessional" so as to prohibit him from practising. Of course it is all a question of degree, and a surgeon might, for example, so lose his skill as to render it manifestly improper for him to attempt an operation, in which circumstances it would be "unprofessional" for him to imperil the life of a patient by attempting something beyond his powers. In this case, however, that is not the state of affairs, and I am of the opinion that the council was right in acquitting the accused on these heads, and they are far better able to deal with such matters, almost exclusively of skill and practice, than we are. At the same time it must be understood that if a medical man voluntarily incapacitated himself by drink or drugs from being able to exercise the skill he possessed, and then attempted to exercise it, that would be highly unprofessional.

Charges Nos. 1, 3, 6, and 7 stand on a different footing, and, if proved as alleged, would be deemed unprofessional both as regards doctors and the public: see my remarks on this subject in Re Telford, 11 B. C. R. 355, 363, 2 W. L. R. 405.

Passing over charge No. 7, which is untenable on the evidence, I turn to that of insobriety, which is here the most important, for, in the present circumstances, it largely affects the others. After a careful consideration of the evidence, I am of the opinion that the view of the majority of the council must be sustained, and this quite apart from any personal knowledge any member thereof might have had of Dr. Hanington's peculiarities. I by no means say that there is no ground for suspicion, but I do say, shortly, that if Inverarity himself, with the opportunities he had at the time, could not bring himself to say that this physician was intoxicated, I cannot do so.

Then as to charge No. 6, I am of the opinion that the council took a lenient view when they called this strange act "injudicious." I think it was at least censurable, and the excuse given far from satisfactory. But the character of the act here turns upon the motive for its performance, which is interwoven with the question of intoxication, and if that fact had been established, then I should have been disposed to find that in this respect he had acted unprofessionally to shield himself. However, the evidence on this point which would turn the scale comes from the same source which has failed to convince me on the charge of drunkenness, and so creates such an element of doubt in my mind as to the intention of the accused that I think he should have the benefit of it. But such actions, even when induced by the best of motives, not unnaturally give rise to such suspicion that they should be avoided. This charge then is dismissed, but with a caution.

There remains then only the charge of neglect. By a majority of one the council have exonerated Dr. Hanington on this point, and up to the time he left the patient I think there is no reason to quarrel with that decision, for he had been in continuous attendance upon her, and, if not intoxicated, doing his best in a difficult case. But at the time, about 7 a.m., he left, taking Dr. Carter with him (who had been called in to assist him), the patient was in a dying condition, "absolutely hopeless," he describes it. The reason he gives for his departure is that the trained nurse he

had sent for had just arrived, and "there was nothing in the symptoms that Miss Goward or any skilled, trained nurse could not attend to as well as we could, and there was no object in keeping Dr. Carter." . . . . At p. 139 he explains:—

I was going down with Mr. Inverarity (to an hotel in town). I intended to come back as soon as I could, to telephone to Dr. Frank Hall that there would be no special need of his coming just at present. I went down with Dr. Carter and Mr. Inverarity.

Q. You intended to come back as soon as you could? A. I not only intended, but I did. I simply went to my office; the cab had to do something, I ordered my trap, and was back there somewhere—Miss Goward had gone at all events.

Q. How long was it before you came back? A. Well, within an hour.

Q. And Miss Goward had gone when you got there? A. Yes, and I was very much annoyed at finding her gone, too; Mrs. Anderson was there, and said Mrs. Inverarity had died a short time before.

Dr. Carter, the assistant, says, pp. 44-5:—

Q. You saw the patient just as you left. Would you say she was going to live or die? A. I would say her chances of recovery were very poor.

Q. Did the patient herself ask you to remain? A. She did.

Q. Why didn't you? A. I told her when Mr. Inverarity came into the room, if she wished me to remain to tell him so, and he was in a position to tell Dr. Hanington, and that if they asked me to remain, I would act accordingly.

Q. Did that mean that, owing to your professional etiquette among medical men, you could not remain without Dr. Hanington's sanction? A. I could not remain without Dr. Hanington requesting me to do so, or the husband dismissing Dr. Hanington, and then requesting me to act."

P. 46:—A. If she had been my patient I would not have left her.

Pp. 219-20:—Q. When you left the house, did you have any talk with Dr. Hanington about the condition of the patient? A. I thought she was in a very serious condition.

Q. You objected to going? A. I did.

Q. Dr. Hanington said you were to go? A. He did.

Q. Why? A. Because I was merely his assistant, and it was not my place to remain there at all; he was in charge of the case and he would look after it."

Now I think in the above circumstances that it was a grave error in judgment for Dr. Hanington to have left the patient without even allowing his assistant to remain in response to her request to that effect. I can well understand that where, for example, a physician has done everything possible for a patient on the point of death, he should not refuse to respond to the call of another patient, or leave for other good and sufficient cause, but in such circumstances as those under consideration I am at a loss to understand why the dying woman's wishes were not complied with. I think that, quite apart from any question of professional etiquette between the two doctors, the dictates of humanity should govern such a situation. Dr. Carter might well have discarded etiquette in the presence of death. But this appeal must be decided not on the ground of humanity but of "unprofessional conduct," and I find it impossible, after reading the views of the various members of the council on what was Dr. Hanington's strict duty as a medical man in the circumstances of the case he was attending, to say that the majority has reached an erroneous conclusion in holding that it was not more than an error of judgment. In determining such a question as, when may a doctor properly leave his patient and for how long? the Court must necessarily in the majority of cases, and in other than clear and extreme cases, be guided very largely by the opinions of medical men who have had that experience in such matters which is the safest guide.

On the whole case the evidence is not quite strong enough to support the charges, and therefore the order appealed from should be reversed and the decision of the council restored.

CLEMENT, J.:—Where a tribunal such as is constituted by the Medical Act, after full inquiry, as in this case, absolves the accused, an appellate tribunal should not reverse that decision unless the findings of fact are clearly wrong, or unless, the facts being clear, the tribunal of first instance has applied a standard of conduct which, as between the profession and the public, should not be recognized by the

Courts. As to both these points this Court is in exactly the same position to pass judgment as was my brother Morrison. As to the findings of fact, a careful perusal and reperusal of the evidence has failed to create in my mind any serious doubt as to the correctness of the conclusions arrived at by a majority of the council, and unless, therefore, in applying those findings, the council has set up a wrong standard as to what is and what is not "unprofessional conduct," their refusal to order the erasure of Dr. Hanington's name from the register should be sustained. The only finding of fact which, to my mind, presents this question is the finding, in which all concurred, that Dr. Hanington was "injudicious" in removing from the dead body of the mother the dead body of the child. In deciding that this act was injudicious merely, and not such "unprofessional conduct" as would, in the opinion of the council, warrant the exaction of the extreme penalty, I cannot see that any false or purely professional standard was adopted. I think the learned doctors did set up as their guide the standard of the public interest and did have present to their minds the duty owed by the attending physician to the family and friends of the deceased mother. They acquitted Dr. Hanington of improper motive, and I think they were right in so doing; and I cannot say that they gauged his conduct by too low a standard in treating it as not sufficiently culpable to warrant the council in expelling him from the ranks of the profession.

One main charge underlay and coloured all the rest, namely, the charge of intoxication, and it is impossible not to see by the constantly recurring remarks of the medical men concerned that they imported into the case their own personal knowledge and opinion of Dr. Hanington and his habits. I can only read the evidence in "cold type," and I feel constrained to say that in view of Inverarity's own evidence the council would not have been justified in finding the accused guilty of this particular charge. Inverarity, warned in advance, with every incentive and full opportunity to make critical examination, could, he says, see no sign of intoxication.

I would allow the appeal with costs here and below.

BRITISH COLUMBIA.

(VICTORIA.)

APRIL 27TH, 1907.

FULL COURT.

JACKSON v. DRAKE, JACKSON, AND HELMCKEN.

Judgment Debtor—Examination—Rule 610, Supreme Court Rules, 1906—Arrest and Imprisonment for Debt Act, sec. 19—Implied Repeal—Both Enactments in Force—Scope of Examination.

Appeal by a judgment debtor from an order of IRVING, J., under sec. 19 of the Arrest and Imprisonment for Debt Act, requiring the appellant to attend for examination and answer questions regarding the acquirement and disposition of his property anterior to the recovery of the judgment.

The appeal was heard by HUNTER, C.J., MARTIN, J., and CLEMENT, J.

F. Peters, K.C., for the appellant.

C. J. Prior, for the judgment creditor.

HUNTER, C.J.:—Two points were taken by Mr. Peters in support of this appeal.

The first one was that Rule 610 had displaced sec. 19 of the Arrest and Imprisonment for Debt Act, by reason of the fact that sec. 109 of the Supreme Court Act enacts that the Rules are to regulate procedure and practice in the matters therein provided for. Examination, however, of the section and the Rule will shew that they do not cover the same ground. The section deals only with final judgments, the Rule with both judgments and orders; the examination under the section may be before any person named in the order, but under the Rule it must be before a Judge or an officer of the Court; the procedure in the case of a contumacious debtor under the section is by way of committal, while under the Rule it is by way of attachment. It seems to me that the procedure under the Rule is not inconsistent with or repug-

nant to that under the section, but alternative, and that both ought to be regarded as enabling and not as antagonistic to each other.

Suppose a judgment debtor resides at Hazelton. If only the Rule were in force, it would appear that he would be compelled to attend for examination at some other place, the nearest available being about 400 miles away, which might work an unnecessary hardship; but under the Act he might be examined at Hazelton.

The section then being still in force, it seems to me impossible to answer the reasoning of Wilson, C.J., in Ontario Bank v. Mitchell, 32 C. P. 73, and I think that the sum of the matter is that the debtor is at the mercy of the cross-examiner, subject only to the control of the Court, whose duty of course it is to see to it that the process is not used maliciously or oppressively, or for ends foreign to the proper purpose of the examination.

But, even if the section were no longer in force, I think the reasoning of the Court in the case already cited applies equally to the Rule, and that under the Rule the debtor must answer questions regarding the acquirement and disposition of his property anterior to the recovery of the judgment.

The appeal must be dismissed.

MARTIN, J.:—First it is contended that the new Rules of 1906 (in force on and from 1st May, 1906), is to make a complete code of and on the practice and procedure of the Court under secs. 108-9 of the Supreme Court Act, and that, since Rule 610 deals with the examination of judgment debtors, sec. 19 of the Arrest and Imprisonment for Debt Act, ch. 10, R. S. B. C., which deals with the same subject matter, must be deemed to be repealed. Now, for a long time it has been the practice of this Court to grant orders under sec. 19 the same as that appealed from, despite the fact that Rule 610 has existed since 1st January, 1893, as Rule 486 of the Rules of 1890, concurrently with sec. 11 of the Execution Act, ch. 42 of C. S. B. C. 1888, which, on the revision of the statutes in 1897, became substantially said sec. 19. The fact that by such revision no change was made in the practice of the Court of granting orders under both the Rule and the section, makes a strong case for the retention of the practice, and the late re-enactment of Rule

486 as 610 evinces, to my mind, no intention of interfering with the two established remedies.

Of course, if the Rules and the section covered precisely the same ground and attained identical objects, even the unusual circumstances I have mentioned could not save the inference in favour of repeal by the later Rule, which it is conceded has the force, by virtue of said sections of the Supreme Court Act, of a statute. But though under the Rule the examination is a "cross-examination of the severest kind"—Republic of Costa Rica v. Strousberg, 16 Ch. D. 8—so as "to make a judgment debtor tell what assets he has to satisfy the judgment"—Watkins v. Ross, 68 L. T. 423 (per Lindley, L.J.)—and may be resorted to in aid of equitable execution—Hamilton v. Brogden, [1891] W. N. 14—yet, as will be seen later, it is not of so wide a scope as that under the section, and the consequences may differ widely, for the Judge has exceptional and often salutary powers under sec. 15, which is incorporated with sec. 19.

The general rule on the subject is thus stated in Maxwell on Statutes (1905), pp. 247-8: "But repeal by implication is not favoured. A sufficient Act ought not to be held to be repealed by implication without some strong reason. It is a reasonable presumption that the legislature did not intend to keep really contradictory enactments in the statute-book, or to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted, unless it be inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention."

Having regard to the course of legislation already noticed, I do not think we should be justified in overturning the established practice on these examinations, which may both be usefully resorted to according to the object and scope of the investigation the creditor has in view.

Then as to the second ground of appeal. I think we should follow the judgment of the Ontario Court of Common Pleas, in banc, in Ontario Bank v. Mitchell, 32 C. P. 73, which is directly in point.

The appeal should be dismissed with costs.

CLEMENT, J.:—It seems to me that sec. 19 of the Arrest and Imprisonment for Debt Act may very well stand side by side with Marginal Rule 610 of the Supreme Court Rules,

1906. Assuming, however, that the statutory provision has been in effect repealed by the Rule, I think an examination under the rule should be given the very widest latitude. The debtor's protection against an unreasonable or unduly harassing examination is in the last resort in the Court, and I do not think we should attempt to lay down in advance any narrowing rule as to the scope of such an examination. This must be left for determination in each particular case; and I think the ruling of my brother Irving as to the scope of the examination in the case before us is well within a proper construction of the Rule.

I would dismiss the appeal.

BRITISH COLUMBIA.

(VICTORIA.)

APRIL 27TH, 1907.

FULL COURT.

CAIRNS v. BRITISH COLUMBIA SALVAGE CO.

Ship—Wages of Sailor—Term of Hiring—Expiry during Voyage—Desertion of Ship—Forfeiture—Accrual of Debt for Wages de Die in Diem—Jurisdiction of County Court—Amount Less than $200—Appeal.

Appeal by defendants from judgment of LAMPMAN, Judge of the County Court of Victoria, 4 W. L. R. 458.

The appeal was heard by HUNTER, C.J., MARTIN, J., CLEMENT, J.

W. J. Taylor, K.C., for defendants.

F. Peters, K.C., and W. C. Moresby, for plaintiff.

HUNTER, C.J.:—The point as to the jurisdiction of the County Court was disposed of at the hearing. For my part I can find nothing in the statute ousting the ordinary jurisdiction of the Court; it merely creates a concurrent tribunal, evidently with the object of securing a more speedy settlement of claims for wages than would often be possible if only the County Court could be resorted to.

With respect to the construction of the contract, I think that the plaintiff was bound to serve for the entire voyage, no matter how long it took. It is impossible for any one to predict how long a voyage will last: it may take weeks or months longer than any one would anticipate, owing to a break-down of the tackle or machinery, or to stress of weather; but I am unable to concede that a sailor can stop work at sea on the ground that his time was up, no matter how long it takes to reach port.

As to the other point, however, I am not prepared to differ from the trial Judge in his view that the plaintiff could not, on the evidence, be convicted as a deserter. It was not wholly unreasonable, in the particular circumstances, for the plaintiff to say that he did not intend to bind himself for more than the 3 months, especially as he was engaged in coasting service, but, while I think that this view is unsound, other Judges might be of a different opinion, and he was quite within his rights in seeking advice as to his position.

As to the so-called entry of desertion in the log, it is clear that it was not made in accordance with the statute, and was therefore inadmissible.

I think the appeal must be dismissed.

MARTIN, J.:—I confess I find it somewhat difficult, in the circumstances of this case, to satisfy myself on the point of desertion, on which the appeal depends. It is, however, a question of fact which the County Court Judge has determined, on conflicting evidence, in favour of the plaintiff, and I cannot bring myself to say he reached an erroneous conclusion. In determining the intention of the plaintiff, his demeanour in the witness box would, in this case particularly, be of assistance to the Judge.

The appeal, therefore, should be dismissed with costs.

CLEMENT, J.:—I strongly incline to the view that the governing clause in the ship's articles, so far as the length of engagement is concerned, is the clause "voyage not to exceed 3 months." I prefer, however, to base my judgment upon this short ground, that the trial Judge, after hearing the plaintiff subjected to a severe cross-examination, acquitted him of the charge of desertion. His evidence, it may be, is not consistent in all its parts, but in case of a highly penal provision, such as the present, I think the finding of the trial

Judge on this question of fact ought not to be disturbed without the very clearest reasons for so doing.

I would dismiss the appeal.

BRITISH COLUMBIA.

(FERNIE.)

WILSON, Co.C.J. MAY 4TH, 1907.

COUNTY COURT.

CORTESE v. CANADIAN PACIFIC R. W. CO.

Railway—Animals Killed on Track—Dominion Railway Act, 1903—Obligation to Fence—Locality — Interpretation—Onus.

Action to recover damages for certain animals killed on defendants' track in August, 1906.

Alexander I. Fisher and F. C. Lawe, for plaintiffs.

W. R. Ross and J. S. T. Alexander, for defendants.

The following cases were cited: Dreger v. Canadian Northern R. W. Co., 1 W. L. R. 126; Schellenberg v. Canadian Pacific R. W. Co., 3 W. L. R. 457; Carruthers v. Canadian Pacific R. W. Co., 3 W. L. R. 455, 4 W. L. R. 441; Arthur v. Central Ontario R. W. Co., 7 O. W. R. 527, 531; Bacon v. Grand Trunk R. W. Co., 7 O. W. R. 753.

WILSON, Co.C.J.:—In this matter a stated case has been presented, and I have taken a view of the premises.

I find that the animals for the loss of which this action is brought escaped from the plaintiff's land on to the defendants' railway track by reason of there being no fence along the railway track, and that they were there killed by one of the defendants' trains.

If the defendants are required to fence in that locality, I think they are liable under the Act, as I can not find that the animals got upon the track through the negligence, wilful act, or omission of the owner, and I will follow Bacon v. Grand Trunk R. W. Co., as to defendants' liability, no matter from where the animals escaped upon the company's

premises. It seems to me the intention of the Act was to fix a general liability on the defendants, unless they were not required to fence.

What might be described as the general locality around Fernie, standing alone, does not come within the Act, but the locality immediately adjoining might do so by reason of its proximity to Fernie. If what is described as the "locality" of Fernie does not extend further than the limits of the city of Fernie, the land adjoining might readily be described as not being in a settled and inclosed locality. The word "improved" would not apply to the locality. If the locality within the Act is governed by the city limits, then the lands lying west of the city, standing alone, could not come within the Act as a settled and inclosed locality. But, in my view, the lands to the west, including the plaintiffs', come within the limits of the settled locality of Fernie, and, although the plaintiffs' lands are not inclosed, they are fenced to an extent, and being settled, I find they form a part of the community of Fernie. But, in any case, the onus is on the defendants to shew that they come within the exception of the Act (that is, that they are not required to fence in this case), and there being a general duty cast on them, I will find for the plaintiffs with costs.

BRITISH COLUMBIA.

(VANCOUVER.)

HUNTER, C.J. MAY 17TH, 1907.

TRIAL.

DE LAVAL SEPARATOR CO. v. WALWORTH.

Company—Extra-provincial Corporation—Non-registration—Carrying on Business—Goods Forwarded to Agent for Sale—Promissory Notes given for Price—Statute Penalizing the Carrying on of Business by Non-registered Companies—Effect on Contracts—Remedy Confined to Penalty.

Action on promissory notes, payable at Winnipeg, given in settlement of balances owing by defendant on account of separators furnished by plaintiffs.

E. P. Davis, K.C., for plaintiffs.

Joseph Martin, K.C., for defendant.

HUNTER, C.J.:—The sole defence insisted on at the trial was that the notes were illegal and void by reason of the fact that the plaintiffs, being an extra-provincial company, had not registered under sec. 123 of the Companies Act, and that the taking of the notes was a carrying on of business in contravention of that section.

The defendant also counterclaimed, on the same ground, for a declaration that a conveyance of lands given by way of collateral security was void.

The machines were forwarded from Winnipeg under a written contract, executed in British Columbia by the defendant, by the Winnipeg agent of the company, who was then in British Columbia, and the notes were signed by the defendant in British Columbia and forwarded to Winnipeg, being made payable at that place, and were given in settlement of the defendant's indebtedness on account of the machines.

If the contract had been adhered to, it would have been a nice question to determine whether in point of law the defendant was merely an agent for sale of the machines, or whether he was the purchaser; and while the scale would seem to turn in favour of the latter view, as it was admitted that the defendant could give what credit he chose to the customers; that he took the lien notes in his own name; and that he was not paid the salary provided for by the contract; yet it is unnecessary to come to any final conclusion on this point, as I think that the plaintiffs were not carrying on business within the meaning of the section, assuming that Walworth was only an agent for sale.

It would be difficult, if not impossible, to state accurately, and at the same time exhaustively, what would constitute a carrying on of business, but I do not think that where goods are forwarded to an agent for sale, and sold by him in his own name, that that is a transaction within the prohibition, and in any event I very much doubt whether the creating, within the jurisdiction, of an obligation which is to be performed without the jurisdiction, can strictly be said to be a carrying on of business within the jurisdiction.

But I prefer to rest my judgment on the ground that the section does not in terms avoid contracts entered into within the jurisdiction, although it penalizes the carrying on of business by non-registered companies.

It was argued that, as the statute enacts that no extra-provincial company shall carry on business unless licensed

or registered, the legislature meant to prohibit the making of any contracts within the jurisdiction by unregistered companies, and not merely to penalize the failure to register, and, of course, if the language necessarily implies such prohibition, the contention must be allowed; but I do not, however, think that this is the necessary implication.

The case most relied on was Bensley v. Bignold, 5 B. & Ald. 335. In that case it was held that the plaintiffs, who were printers, could not recover for printing a pamphlet, because their names did not appear on the pamphlet in accordance with the statute of 29 Geo. III., which enacted a forfeiture of £20 for every copy distributed without the names printed as required. Whether the reasoning assigned in the judgments would be accepted by the English Courts of to-day, I very much doubt. It seems to me to be in conflict with the general principle insisted on in the House of Lords in Bank of England v. Vagliano, [1891] A. C. 107, and Salomon v. Salomon, [1897] A. C. 22; and by the Judicial Committee in Robinson v. Canadian Pacific R. W. Co., [1892] A C. at p. 488, as well as by the Supreme Court of the United States in the case cited by Mr. Davis of Fritts v. Palmer, 132 U. S. 282, that the Court is not at liberty to insert language in an Act of Parliament which is not to be found there, and also with that which is only an illustration of the general principles, viz., the special proposition stated by Jessel, M.R., in In re International Pulp and Paper Co., 6 Ch. D. at p. 560, and by Brett, M.R., in Attorney-General v. Bradlaugh, 14 Q. B. D. at p. 687, and enforced by the House of Lords in Wright v. Horton, 12 App. Cas. 371, to the effect that where a statute creates a new obligation and enacts a penalty for the breach of it, that is the only penalty.

At any rate, I must apply these principles to the interpretation of the enactment in question, and in doing so I can find no language which imposes any other consequence than the one prescribed, either expressly or by necessary implication; and I think this view is fortified by a comparison of the enactment with other similar enactments in the Revised Statutes, which, according to Lord Westbury in Boston v. Lelievre, L. R. 3 P. C. at p. 162, and Lord Watson in Belize v. Quilter, [1897] A. C. at p. 372, may be construed collectively as being one great Act or code of law.

In the case of dentists, medical practitioners, barristers, and solicitors, it is made unlawful in terms to practise or

carry on business without having a license from the proper authority, and there can be no doubt from the language used that there is the additional consequence that no action will lie for any charges or fees or goods supplied; while, on the other hand, in the case of trades licenses, although to carry on business without a license is made an offence, there is no similar provision barring suits to recover.

The question is, not whether the act is prohibited or made illegal, for that is conceded, but what is the consequence? Applying the foregoing principles and comparing this with similar legislation, I am led to the conclusion that the legislature has not imposed the consequences contended for.

Judgment for the plaintiffs with costs.

BRITISH COLUMBIA.

(VICTORIA.)

MARTIN, J. MAY 22ND, 1907.

TRIAL.

BRYCE v. CANADIAN PACIFIC R. W. CO.

Ship—Collision — Overtaking Vessel—Cause of Collision—Signals—Look-out—Rules of Navigation—"Keep out of the Way" — "Narrow Channels"—"Safe and Practicable"—Usage or Custom of Vessels—Evidence—Credibility of Witness—Erasures and Interlineations in "Scrap Log"—Expert Evidence—Practice of Admiralty Court—Assessors.

An action for damages for injuries to plaintiffs' vessel the "Chehalis" in collision with defendants' vessel the "Princess Victoria."

Joseph Martin, K.C., and F. Peters, K.C., for plaintiffs.

E. V. Bodwell, K.C., E. P. Davis, K.C., and J. E. McMullin, for defendants.

MARTIN, J.:—Though a large amount of evidence was adduced at the trial, yet the more this case is considered the clearer does it become that it is not of a complicated nature.

So far as regards the course, speed, and signals of the "Princess Victoria," I accept the account of her officers as being substantially correct, and, since it is admitted that she was an overtaking vessel within the meaning of article 24 of the Collision Regulations, the main question is, did she perform the duty then cast upon her by said article and article 23, viz., to "keep out of the way of the other vessel," and "on approaching her, if necessary, slacken her speed or stop or reverse?"

It cannot be plausibly urged that the speed of the "Princess" after she rounded Brockton Point—about 6 to 7 knots over the ground—was, in the circumstances, excessive, and beyond doubt there was ample room for her to have passed between the launch and the "Chehalis." Captain Griffin, who gave his evidence in a straightforward manner which favourably impressed the Court, estimated the distance between the two smaller vessels at about 250 yards, and, though it is notoriously difficult to estimate distances on the water, and other witnesses made it less, yet even Dean, the engineer of the "Chehalis," who was a manifestly biassed witness, in answer to the question, "If he (Griffin) had been on a comparatively straight course there was lots of room between your boat and the launch for him to pass through?" said, "Of course there was; he was trying to do that; the tide chucked him over on to us."

The plaintiffs' main case, in effect, is that in the effort to avoid running down the launch, which at one time was steering a somewhat erratic course, the "Princess" failed to continuously observe the course of the "Chehalis" until she had got into perilous proximity to her, and that when she did give the two-blast signal, followed up by the stopping and reversing of her engines, it was too late to be of any service.

On the other hand, the defendants contend that the "Princess" did keep out of the way, but that the proximate cause of the accident was a sudden change in the course of the "Chehalis," constituting an infringement of article 21, requiring her to "keep her course and speed."

I am satisfied that the officers in the pilot house of the "Princess" did keep a proper and continuous look-out, and that at the time the two blasts were blown she, having just then freed herself from the anticipation of any danger from the launch close to her port bow, which had caused a momentary but immaterial deviation from her course, was

steadied on a course W. by N. ½ N., within a ¼ of a point, so as to just clear Prospect Point and take her straight down the Narrows, which course was roughly parallel to that of the "Chehalis." Had these respective courses and speeds been maintained, there was at that time no reason to anticipate any danger of collision, though the courses would probably have ultimately converged. I say "probably" only because the master of the "Chehalis" admits that he was not steering a compass course, and confessed his inability to lay it down on the chart. Indeed, his compass-box was, he says, shut up, and he explains, "I didn't lay down any course, except just with the eye; that is all, roughly."

"Q. The only object you had in view was to leave the wharf, get out of the Narrows, and cross the tide in the easiest way for your ship?

"A. Yes, not to run anything down or get into the way of anything."

Being steadied then on this course, and having no reason whatever to expect that the "Chehalis" would change the course she was on, which offered the "Princess" ample room to pass withou running any risk, the "Princess" gave the proper signal that she was directing, here equivalent to continuing, her course to the port side of the "Chehalis," i.e., that she was on a course which would pass the "Chehalis" on the port side, not that she was changing her existing course. But I find that while said blasts were being blown, or immediately thereafter, the "Chehalis" suddenly altered her course at least 3 to 4 points from west to southward, thus bringing herself across the bows of the "Princess." Immediately upon this change of course being observed, the engines of the "Princess" were stopped and reversed with the object of avoiding the "Chehalis," but though at the time of impact her way was stopped over the ground, yet she was probably still making 4, or possibly 5, knots through the water, with the result that the collision complained of took place, though the force of it was much reduced by these manœuvres, and the "Chehalis" was not struck by the stem of the "Princess," but swept up against her in a glancing direction on her starboard bow.

Though it is not for the defendants to supply the explanation of this sudden change in the course of the "Chehalis," which caused the accident, I have very little, if any, doubt that it was owing to the fact that Captain House, as he admits, only kept a look-out ahead, and I believe he was

startled when he heard the signal and made a wrong movement of his wheel at a critical moment in the strong tide. There must have been something of the kind, for House did not take the position that he was thrown out of his course by an unforeseen eddy or current or otherwise. On the contrary, he was fully alive to the tide conditions that he was meeting, and, he says, overcoming, and asserted his ability to hold his ship to her course within 6 degrees (about ½ a point) against the tide; Dean also maintains "she was steady as a street car on the track." House says frankly that the reason why he kept no look-out astern was that, in his opinion, it was not necessary for him to do so, and that he was "perfectly regardless of what was coming up behind him," in fact "utterly indifferent." While the regulations do not specifically require a look-out to be kept astern, yet article 29, with the heading "No vessel under any circumstances to neglect proper precautions," in effect directs it to be done in special circumstances (as an example of which see the illustration given in The "Illinois," 103 U. S. 298), and I entirely agree in the strong opinion of the assessors, who have had long personal experience of the locality in question, that Captain House cannot be exonerated, in the special circumstances of this case, having regard to his course, the nature of the tide, the low power of his vessel (which, after it struck the full force of the tide, could not have been making more than two knots over the ground, and probably less), and the amount of shipping plying in the Narrows, for neglecting to take the eminently proper precaution of keeping a bright look-out in all directions when he was crossing the channel on his diagonal course from the north to the south shore thereof. The course chosen by him called for constant vigilance, and one of his own witnesses, Captain Newcombe, admitted that in the existing conditions it was his duty, and the duty of every captain so crossing that channel, to have kept a general look-out, i.e., a look-out all round. In our opinion, had that necessary precaution been taken, this deplorable collision would have been averted, but, in view of the fact that it was not the direct consequence or proximate cause of the accident, it becomes, strictly speaking, unnecessary to consider the full and exact extent of its contribution thereto. I here observe that The "Arranmore" v. Rudolph, 38 S. C. R. 176, to which reference is made, is merely a case where "the ab-

sence of a look-out clearly had nothing to do with the collision."

On the whole case, I find myself unable, on the evidence and in the circumstances, to take the view advanced by the plaintiffs' counsel, that the "Princess Victoria" acted rashly and ran so close to the "Chehalis," without warning, as to put both vessels in dangerous proximity in the state of the tide. In the position that the 3 vessels then were in and at the speeds they were going, there was no reason why all 3 should not, by the exercise of ordinary good seamanship, have proceeded down the channel without any apprehension of danger of collision, nor would there have been one if the "Chehalis" maintained her course and speed. To hold otherwise on the facts would be like "being wise after the event," which, as was said in Cape Breton v. Richelieu and Ontario Navigation Co., 36 S. C. R. at 575, "cannot be a guide for our decision." While it was admittedly the duty of the "Princess Victoria" to keep out of the way, and, "if necessary," but not otherwise (The Anselm, 23 Times L. R. 378), to comply with article 23, I am satisfied that she did comply with it just as soon as it became reasonable and proper for her to do so, which is all the article requires. Nor can I see that she was to blame for not having signalled before, even apart from the fact that she was entitled to assume that she had already been observed by the "Chehalis;" indeed, if she had done so, there would have been great danger of confusing the launch, which was nearest to her, and would naturally take the signal as being primarily applicable to her.

Having regard to the relative positions in the channel of the 3 vessels after the "Princess" had rounded the point, the mid-channel course which she took was the only proper one for her to take as a matter of good seamanship, as I am advised, consistent with her own safety, and it would be unreasonable to expect her to have gone to the north of the "Chehalis," already on the northerly course, and under her stern.

Some discussion arose as to the meaning of the expression "keep out of the way" in article 24, and the argument was advanced for the plaintiffs that this was an absolute direction, which would not be satisfied by an unsuccessful attempt to do so. Such an extreme view, however, is at variance with the decision of the Court of Appeal in The "Saragossa," 7 Asp. M. C. 289, wherein it is laid down that no

more than the exercise of reasonable care and skill is required of the overtaking vessel when the overtaken vessel deviates from her course.

Frequent references were made at the trial to article 25, dealing with "narrow channels," and it may be desirable to express my opinion on the point, as applied to the locality here in question. At Prospect Point, where the First Narrows begin, the channel is about a cable in width, and it expands, though irregularly, till at Brockton Point it is nearly 5 cables; at the point where the collision took place it is about 4½ cables. It is not easy to determine the expression "narrow channel" as used in the rule, but there are a number of decisions cited in Marsden on Collisions (1904), p. 441, and Roscoe's Admiralty Practice (1903), p. 240. It is clear, however, that the question does not merely depend upon the width, as seems to have been assumed in the very late case of The "Arranmore," supra, where it is stated, apparently without argument, that a channel "over half a mile wide does not come under the heading of narrow water." With all due respect to that remark, which I regard as obiter dictum, I observe that it is said in The "Glengariff," 93 L. T. N. S. 281: "I do not think it has ever been laid down what is a narrow channel. There have been cases in which certain places have been held to be narrow channels, and in which definite decisions have been given on definite facts. . . ."

In The "Cuba" v. McMillan, 26 S. C. R. 51, a channel about 4 miles in length with a mean width of about a mile and a quarter was held to be a narrow one.

The question must, therefore, in my opinion, be decided upon the special circumstances in each case, and in determining it the amount of shipping must, e.g., be taken into consideration, for it is obvious that what might be considered a broad channel for a small number of slow, low-powered vessels, would not be so if a large number of fast and high-powered vessels constantly used it, as is the case here; the strength and nature of the tides also and their effect upon navigation and the configuration of the shores could not be ignored in arriving at a satisfactory conclusion. In so doing I note that all the surrounding circumstances were considered by the same Court in The "Calvin Austin" v. Lovitt, 35 S. C. R. 616, 9 Ex. C. R. 160.

Applying those guides to the case at bar, I have come to the conclusion that the First Narrows from Prospect Point

to Brockton Point (a distance of approximately one and a quarter sea miles) must be deemed to be a narrow channel within the meaning of said article. As a matter of precaution, I have asked the assessors for their view of the matter, and they are of the same opinion.

The meaning of the expression "safe and practicable" has often been considered, and varying definitions given according to the circumstances: see, e.g., The "Unity," Swab. 101; The "Hand of Providence," ib. 107; The "Nimrod," 15 Jur. 1201; The "Panther," 1 Sp. 31; and Lovitt v. The "Calvin Austin," 9 Ex. C. R. 160, 180-4, 35 S. C. R. 616; and it depends upon the evidence, but it is quite clear that on the facts of this case, and according to Captain House's testimony, it was on the day in question "safe and practicable" from any point of view, both as regards herself and other vessels, for the "Chehalis" to have kept along that north side of the narrow channel from which she started. The necessity for her crossing to the south side has not been made clear, and, taken with the absence of a proper look-out, it is difficult to see how such a proceeding can be justified. Convenience is not enough: The "Fyenoord," Swab. 374; The "Unity," supra; The "Hand of Providence," supra; and he had no business to take her there, as was the case in The "Purim," cited in Marsden on Collisions (supra), wherein at p. 441, it is said: "The re-enactment of the starboard side rule and its insertion in the regulations are of the utmost consequence to seamen. Any person in charge of a ship who navigated her on the wrong side of a narrow channel, besides being guilty of a misdemeanour, will almost inevitably subject himself and his owners to liability for any collision occurring when he is on his wrong side, unless it is proved that his being on the wrong side was unavoidable."

Though some evidence was given in support of the existence of a usage, practice, or custom for vessels starting from the south side of the inlet to keep along the same side of the channel on a course through the Narrows, yet nothing of the kind was established to my satisfaction in the case of vessels starting from the north side, and, in my opinion, nothing should be said to encourage such a practice in the latter case, which is decidedly dangerous unless the channel is clear and unobstructed and free from any apprehension of danger from any quarter. Nor do I wish it understood that I am satisfied with the evidence in favour of the former

practice, nor have I considered, for it is at present unnecessary, to what extent it might affect article 25. The subject is an intricate one, and cases on it in regard to tidal rivers only, but not arms of the sea, will be found, e.g., in Roscoe's Adm. Prac. p. 241, note (v), and Marsden on Collisions, pp.441 (cases in note (1)), 444-5; from note (a) p. 444 it appears that the Court will, if necessary, ask the advice of the assessors on the point. It is enough to refer to what has already been said on the point, viz., that the "Princess" that day, having regard to the circumstances, was justified as a matter of good seamanship in taking the mid-channel course between the two other vessels, but she was, nevertheless, still bound to observe the general rules of navigation with respect to the "Chehalis," even though the latter was infringing article 25: The "Leverington," 11 P. D. 117; The "Cuba" v. McMillan, 26 S. C. R. 661.

With respect to article 22, its consideration is, so far as is necessary, involved in that of the other articles, which have already been fully dealt with. There was, in short, no breach of it by the "Princess Victoria;" she was not, properly speaking, "crossing ahead" of the "Chehalis." The position was, in reality, very similar to that of one of those cases illustrated by Mr. Justice King in The "Cuba" v. McMillan, supra, at p. 659, wherein he said: "In such cases no statutory rule is imposed, because, unless there is a change in the course of one or both of the vessels, they will go clear of each other, and no statutory rule is made to meet the case, but it is left to the operation of the rules of good seamanship."

As to article 28 and the signal to be given on going astern, it will be sufficient to say that, though some questions were asked at the trial about it, no argument was advanced upon it, doubtless for the reason that the failure to give it, in the circumstances, could manifestly have no good effect whatever, but probably the reverse. Indeed, Mr. Martin's position was that after the whistle blew events followed so rapidly that there was no way of avoiding the collision.

On the whole case, I am advised by the assessors that, in their opinion, the master of the "Princess Victoria" gave the signal indicating the continuation of his course to port at the earliest time consistent with the position of the vessels, and that he did not neglect to take any proper precautions which a prudent and skilful navigator should have taken, seeing that he was justified in assuming that the "Che-

halis" would maintain her course and speed, which then gave no reason to apprehend danger; and further that after the change in the course of the "Chehalis" he did not fail to execute any proper manœuvre, but, on the contrary, did all that could reasonably be expected of him in the circumstances. I am also advised by the assessors that if the "Chehalis," after she had changed her course, had reversed her engines at the same time that the "Princess" did, the collision would in all probability have been averted or its consequences minimized.

I entirely agree with these views.

The delivery of judgment has been delayed because at the argument reference was made to certain cases then pending before other Courts, the full reports of which, with some others, have since come to hand, viz., Richelieu and Ontario Navigation Co. v. Cape Breton Steamship Co., 76 L. J. P. C. 14; The "Arranmore," supra; The "Albano" v. The "Parisian," 23 Times L. R. 344; The "Oravia," ib. 358; and The "Anselm," ib. 378.

With the exception of the "Albano" case, these decisions do not call for remark other than what may already have been made. As regards the "Albano" case, though it is important and instructive on most of the articles involved in the case at bar, and their origin and object, yet the circumstances are fundamentally different: the two ships there were approaching the same spot to take up pilots, and the main question was different, the "Parisian" claiming exemption from the regulations because she arrived on the spot first with little motion. As an illustration, their Lordships, speaking of the speeds and courses of the two ships, say: "They were in fact converging on a spot on courses and at speeds which would probably bring them to that spot so as to present a danger of collision when they reached it. . . ."

In the case at bar, the fact is exactly contrary. So far as the "Chehalis" is concerned, these remarks point out her full duty: "She was bound to comply with article 21, and to keep her course and speed until she found herself so close to the 'Parisian' that the collision could not be avoided by the action of the latter vessel alone. . . ."

Some rather severe strictures, based upon the remarks of Lord Westbury in The "Singapore," L. R. 1 P. C. 380, were made upon the credibility of the master of the "Princess

Victoria," because of certain erasures and interlineations in the book, written in pencil, described as the rough or scrap log. But the learned counsel has failed to distinguish between that log, which, as its name indicates, is of a preliminary or draft character, and the official log of the vessel, likewise before us, written in ink and kept in a formal manner, being in fact a fair copy of the draft prepared by, in this instance, the master and signed by him. Reference to this official log and the statutes bearing on it will conveniently be found in Roscoe's Adm. Prac. (1903) pp. 355, 519, 552; and Williams and Bruce Adm. Prac. (1902), pp. 420, note (o), 431-2. It is to an official log of this latter nature that the remarks of Lord Westbury, which follow, would apply: "It is, no doubt, of the highest importance that documents of this kind, having been originally drawn up in a given form, should have that form preserved, and that there should neither be erasure, obliteration, nor alteration, subsequently made. It is admitted by the counsel for The 'Singapore' that the entry must be taken as it was originally, so that it would have been impossible for them to contend that the wind was north-north-east, seeing that the original entry was that the wind was northerly."

It would be unreasonable to expect any man to draw up in exact language, without any changes whatever, an account of an occurrence such as the present, nor could he be expected to enter it in the official log without first having made a draft of it, either on a sheet of paper or in a note book of some kind. In drawing up his account of the matter, on the voyage to Victoria the same afternoon, in the pilot house, the master admits that he made erasures and alterations, as he wrote, to cover slight inaccuracies or to satisfy himself as to the wording of it. This was done in the presence of the first officer, but not in consultation with him, and the scrap log was left in the pilot house for the purpose of being copied by that officer into the official log the same day in the ordinary course of duty, which was done. In such circumstances, I see no occasion for any reflection being cast upon the master either as regards the way the official log was prepared, or as regards his credibility. His full explanation is quite satisfactory to this Court.

During the trial a ruling on evidence was given which I was requested to mention in this judgment, and consequently do so. The defendant tendered the evidence of

several witnesses possessed of nautical skill, with the object of having them express their opinion on the manœuvres of the two vessels and the proper action to be taken by them in the various positions under consideration—giving expert evidence, in short. This was objected to as being against the practice of the Admiralty Court, which relies for guidance in that respect on the skilled assessors it has summoned to its assistance for that purpose, and there is no doubt that the practice of that Court, both in England and in Canada, including the Admiralty district of this province, over which I have the honour to preside, is as thus contended for. See the following cases: The "Gazelle," 1 W. Rob. 471-4; The "Ann and Mary," 2 W. Rob. 189; The "Velocity," L. R. 3 P. C. 44; The "Earl Spencer," L. R. 4 Ad. & Ecc. 433; The "Andalusian," 2 P. D. 231; The "Robert Peel," 4 Asp. 321; The "Marina," 29 W. R. 508; The "Kestrel," 6 P. D. 189; The "Kirby Hall," 8 P. D. 75-6; The "Assyrian," 6 Asp. 525; and Harbour Commissioners of Montreal v. The "Universe," 10 Ex. C. R. 306. But it was urged that the practice of the Admiralty Court should not be followed in this Court, and that, in any event, it was a matter for the exercise of discretion. As to the latter, in the exercise of any discretion I may have, I prefer to rely solely upon the advice of the assessors whom I have summoned to assist me, and as to the former, it would, as a matter of practice, seem anomalous and inconsistent for this Court to borrow from the Admiralty Court its most useful practice of calling in assessors, and yet at the same time to largely defeat and nullify the object thereof by engrafting upon it expert testimony which must be adduced in Courts which have not the advantage of assessors. I find that I am not without a precedent in reaching this conclusion, for it was adopted in the case of The "Kestrel," 6 P. D. 182, by the President (Sir James Hannen) and Sir Robert Phillimore, assisted by nautical assessors, when sitting as a special Court of Appeal under the shipping Casualties Investigations Act, 1879, on an appeal from the Wreck Commissioners. The President said, p. 189: "I have been informed what the practice of the Admiralty Division is with respect to evidence of this kind, and it commends itself to my judgment, and I think that we ought to adopt it in these appeals. We have nautical assessors, whose duty it is to advise us in these matters, and, apart from other objections, I can conceive that the admission of

such evidence would inconveniently add to the length of the hearing in these cases. We refuse to allow the proposed witnesses to be called."

For the above reasons and on the authorities cited, the evidence was rejected.

There only remains for me the duty of giving effect to the foregoing findings and reasons by directing judgment to be entered in favour of the defendants.

NORTH-WEST PROVINCES.

(REGINA.)

APRIL 30TH, 1907.

FULL COURT.

REX v. STANDARD SOAP CO.

Criminal Law—Charge against Incorporated Company—Procedure—Criminal Code, sec. 873—Order of Court Authorizing Charge—North-West Territories Act—Grand Jury not Existing in Provinces of Saskatchewan and Alberta—Corporation not Subject to Preliminary Examination by Magistrate—Formal Charge in Lieu of Indictment.

Crown case reserved by STUART, J., for the opinion of this Court, under sec. 1014 of the Criminal Code, R. S. C. 1906, as follows:—

On 15th March, 1907, Mr. James Short, agent for the Attorney-General, and Crown Prosecutor for the Calgary Judicial District, appeared before me in open Court, and applied under sec. 873, sub-sec. 2, of the Criminal Code, 1906, for an order that a charge be preferred by him before the Court against the Standard Soap Company, Limited, a corporation, for a violation of the provisions of sec. 236 of the Code. The defendant corporation were not represented on this application. The material upon which the application was made, and the sufficiency of which is not now in question, consisted of certain depositions taken upon a preliminary investigation of a charge under the same section of the Code

against the secretary of the corporation personally, upon which the magistrate had refused to make a committal for trial, and also of an affidavit of the agent of the Attorney-General stating that he had good reason to believe, and did believe, that the defendant corporation were guilty of the offence alleged, and to which affidavit a letter from the Deputy Attorney-General for Alberta was attached as an exhibit. This letter is as follows:

Department of the Attorney-General,
Edmonton, Alberta,
March 11th, 1907.

James Short, Esq.,
Agent Attorney-General,
Calgary, Alta.

You are hereby authorized to prefer a charge against the Standard Soap Company, before the Supreme Court of the North-West Territories in the Judicial District of Calgary, for that the said company did in the city of Calgary, in the province of Alberta, in or about the month of June, 1906, and on divers times thereafter during said year, unlawfully conduct a certain scheme for the purpose of determining the holders of what lots or tickets were the winners of certain property, to wit, a piano, a Gurney Oxford Chancellor range, a baby carriage, and other articles, proposed to be given or disposed of by a mode of chance, contrary to the statute in such cases made and provided.

S. B. Woods,
Deputy Attorney-General.

I granted the following order:—

"Upon the application of James Short, agent for the Attorney-General for the province of Alberta, upon hearing what was alleged by said James Short, upon reading the direction of the Deputy of said Attorney-General, and the depositions taken at the preliminary inquiry in the case of the King against Frederick T. Weir, which depositions were filed this 15th day of March, 1907:—

"This Court doth order the said James Short, agent for the Attorney-General, to prefer a charge before this Court, being the Supreme Court of the North-West Territories, Judicial District of Calgary, now sitting at Calgary aforesaid,

against the said the Standard Soap Company, Limited, as follows:

"Canada,	The King
"Province of Alberta,	v.
"Judicial District of Calgary	The Standard Soap Company,
"To wit:	Limited.

"The Standard Soap Company, Limited, stands charged before the Honourable Charles A. Stuart, a Judge of the Supreme Court of the North-West Territories, Judicial District of Calgary, at the city of Calgary, in said Judicial District, this 15th day of March, 1907:—

"For that the said the Standard Soap Company, Limited, did in the city of Calgary, in the province of Alberta, in or about the month of June, 1906, and on divers other times thereafter during said year, unlawfully conduct a certain scheme for the purpose of determining the holders of what lots or tickets were the winners of certain property, to wit, a piano, a Gurney Oxford Chancellor range, a baby carriage, and other articles, proposed to be given or disposed of by a mode of chance, contrary to the statute in such cases made and provided.

James Short,
"Judicial District of Crown Prosecutor,
"Calgary, Agent for the Attorney-General.
"L.J.C.

"Dated at Calgary this 15th day of March, 1907.

By the Court,
"Chas. A. Stuart, Laurence J. Clarke,
"J.S.C. Clerk of Court.

A charge was forthwith prepared and signed by the agent of the Attorney-General and filed in Court. The Court was then adjourned to allow the proper notice to be served on the defendant corporation, as provided by sec. 918 of the Code, R. S. C. 1906. A notice was accordingly duly served upon the secretary of the defendant corporation, and on 30th March the defendant corporation appeared in Court in pursuance of the notice, by their attorney, one F. T. Weir. The charge was then read, and, instead of pleading thereto, the defendant corporation by their counsel, Mr. Nolan, applied for time to demur to the charge. This application was granted, and on 3rd April the defendant corporation by their

counsel filed a written demurrer, to which the agent for the Attorney-General filed a rejoinder.

The ground taken by the counsel for the defendant corporation in support of the demurrer was that a bill of indictment could not be preferred before any Court under the section in question except before a grand jury as part of a Court, and that, as there is no grand jury in the provinces of Saskatchewan and Alberta, there was no authority to make the order in question.

After hearing argument for the defendant corporation and for the Crown I was of opinion that the demurrer should be sustained, and therefore dismissed the charge.

The question reserved for the opinion of the Court en banc is: Should the demurrer have been sustained upon the grounds taken in support thereof? If this question is answered in the affirmative, the charge will stand dismissed; and if answered in the negative, the defendant corporation will be required to appear at the next sittings of the Court, at Calgary, and plead to the said charge, and stand their trial thereon.

James Allan, Regina, for the Crown.

P. J. Nolan, Calgary, for the defendants.

The judgment of the Court (SIFTON, C.J., WETMORE, SCOTT, NEWLANDS, HARVEY, and JOHNSTONE, JJ.), was delivered by

NEWLANDS, J.:—The North-West Territories Act, ch. 50, R. S. C. 1886, sec. 65, provided that the procedure in criminal cases shall, subject to any Act of the Parliament of Canada, conform as nearly as may be to the procedure existing in like cases in England on the 15th day of July, 1870; but no grand jury shall be summoned or sit in the Territories. This Act was amended by 54 & 55 Vict. ch. 22, sec. 11, which provided that, in lieu of indictments and forms of indictment as provided by the Criminal Procedure Act, the trial of any person charged with a criminal offence in the North-West Territories shall be commenced by a formal charge in writing setting forth as in an indictment the offence wherewith he is charged. When the Criminal Code, 1892, was enacted, it was, by sec. 983, made applicable to the North-West Territories, except in so far as it was incon-

sistent with the provisions of the North-West Territories Act and the amendments thereto.

As far as this case is concerned, the only changes made in the Code by that Act are that instead of an indictment being presented by a grand jury to the Court where a person is charged with a criminal offence, the proceedings are commenced by a charge in writing setting forth the offence in the same manner as in an indictment.

When the provinces of Saskatchewan and Alberta were formed by the Saskatchewan and Alberta Acts, the North-West Territories Act ceased to apply to them, as by the North-West Territories Amendment Act passed at the same session of the Parliament of Canada, and which came into force on the same day as the Saskatchewan and Alberta Acts, namely, 1st September, 1905, the words "North-West Territories" used in that Act were changed to mean only the territory north of those provinces and the province of Manitoba, excepting the Yukon Territory, but it was by the Saskatchewan and Alberta Acts expressly provided that all laws, so far as they were not inconsistent with anything contained in those Acts, or where those Acts contained no provision intended as a substitute therefor existing immediately before the coming into force of those Acts in the Territories thereby established into provinces, should continue in those provinces as if those Acts had not been passed.

As no change was made by those Acts in the procedure in criminal cases, the laws relating thereto continued as before, and there has been no change made since, so that criminal prosecutions are commenced in the same manner as when the North-West Territories Act was in force.

It was argued by Mr. Nolan that, because ch. 50, R. S. C. 1886, had been repealed by the R. S. C. 1906, there was now no law in force excepting the Criminal Code, but, as I have shewn, that Act ceased to affect these provinces after the passing of the Saskatchewan and Alberta Acts, so that the repeal of ch. 50, R. S. C. 1886, could have no effect upon the laws of these provinces.

It therefore only remains for me to see that the procedure provided by the Criminal Code, as altered by the North-West Territories Act, has been followed in this case. It is unnecessary to consider the procedure in ordinary criminal cases, because it has been held that the same proceedings cannot be taken against a corporation as against an individual,

they not being subject to a preliminary examination before a magistrate as an individual.

Robertson, J., in Re Chapman and City of London, 19 O. R. 33, at p. 38, says: "I am clearly of opinion that the justice has no jurisdiction in this matter; he cannot compel the corporations, or either of them, to appear before him; should he summon them, they need not obey; should they not obey, he cannot issue a warrant to bring them or either of them before him: although they and each of them are a corporate body, yet their 'body' cannot be taken into custody, and the justice has no power to proceed ex parte. The accused must be before the Court when the testimony is given, and the procedure points out what is to be done when the accused does appear, etc. Nor can he, the justice, commit, or detain in custody, nor can he bind over to appear and answer to an indictment; that being so, he has no jurisdiction to bind over the prosecutor, or person who intends to present the indictment, etc."

This decision was followed by a Divisional Court in Regina v. City of London, 32 O. R. 326, and I see no reason why it should not be followed by this Court. This disposes of the argument of Mr. Nolan that the company in this case were brought before the Court without a preliminary examination. They, therefore, must be proceeded against by one of the methods set out in sec. 873 of the Criminal Code, R. S. C. 1906.

This section makes it clear that no one but the Attorney-General, or some one by his direction or with the consent or order of a Judge, may prefer an indictment unless preceded by a preliminary examination before a magistrate.

Now, as it is provided by the law in force in the provinces of Saskatchewan and Alberta that there shall be no grand jury, and that a formal charge shall be laid in lieu of an indictment, it follows that this section is complied with by a formal charge in writing being laid either by the Attorney-General, or by some one under his direction, or with the consent or order of a Judge, and the corporation must appear by attorney and plead or demur thereto as provided by sec. 619, R. S. C. 1906.

In this case the offence was committed in the province of Alberta, and Mr. Short, by direction of the Attorney-General for that province, obtained an order from a Judge to lay the charge, and a formal charge in writing was presented to the

Court. Section 873 of the Code, as altered by the North-West Territories Act, and continued in force, is therefore fully complied with, and the learned Judge should not have sustained the demurrer on the grounds taken in support thereof, and the question submitted for the opinion of the Court should therefore be answered in the negative.

NORTH-WEST PROVINCES.

(REGINA.)

APRIL 30TH, 1907.

FULL COURT.

CROWSTON v. TATE.

Contract—Sale of Lumber Mill and Timber Limit—Price to be Paid in Cash and Work—Breach—Rescission—Damages—Specific Performance—Improvements—Occupation Rent—Counterclaim—Loss of Profits.

Appeal by defendants from judgment of PRENDERGAST, J., at the trial, in favour of plaintiff, in an action upon the agreement set forth below.

J. McKay, K.C., Prince Albert, and H. A. Robson, Winnipeg, for defendants.

A. Turgeon, Prince Albert, for plaintiff.

The judgment of the Court (SIFTON, C.J., SCOTT, NEWLANDS, HARVEY, STUART, and JOHNSTONE, JJ.), was delivered by

SCOTT, J.:—The action was brought under an agreement under seal, dated 7th March, 1905, made between the defendants of the first part and the plaintiff of the second part, the provisions of which are as follows:—

"Witnesseth that the said parties hereto do hereby mutually covenant, promise, and agree to and with each other in manner and terms following, that is to say:—

1. That in consideration of the sum of $8,000 to be paid by the said party of the second part to the said parties of the first part, as hereinafter provided, they, the said parties of the first part, hereby agree to sell, transfer, and assign to the said party of the second part, upon payment of the said sum of $8,000, all their right, title, and interest in and to timber berth No. 853, comprising township 42 in range 16 west of the second meridian, together with all their right, title, and interest in and to the lumber mill situate upon said timber berth, machinery, and buildings situate thereon and in any way relating thereto.

2. The said party of the second part agrees to pay to the said parties of the first part the said sum of $8,000 as follows:—

(1) The sum of $1,300 on the execution of these presents.

(2) The party of the second part agrees to saw into lumber all cut logs belonging to the parties of the first part, that are or may at any time hereafter be situate upon the said hereinbefore described timber berth, and to pile the same thereafter on the premises; all said work to be done and completed in a workmanlike manner and with all due expedition within 6 months from the date of these presents, the whole of said work to be done by the party of the second part at the rate of $5 per thousand feet b.m., the money so earned to be applied on account of the said purchase price.

(3) The party of the second part further agrees to do all planing and matching of lumber for the parties of the first part at any and all times and whenever he may be required so to do by them, charging for said work at the rate of $3 per thousand feet b.m., the sum so earned to be applied on account of the said purchase price.

(4) And the party of the second part further agrees to pay whatever balance may then be due, after applying the proceeds of the above mentioned work to the purchase money as follows: One-half of said balance on the 1st day of January, 1906, and the balance of said purchase money on the 1st day of January, 1907.

(5) The said party of the second part further agrees to pay interest at the rate of 6 per cent. per annum, to be computed from the date of these presents, on so much of the purchase money as shall from time to time remain unpaid till the whole of the principal money and interest is paid.

all payments of interest to be made on the 1st day of January in each and every year.

3. It is further hereby agreed that the title, ownership, and right to the possession of the said timber berth, lumber-mill, machinery, and buildings, hereinbefore referred to, shall remain and be vested in the said parties of the first part until all of the said purchase money of $8,000 and interest is fully paid to the parties of the first part.

4. It is further hereby agreed that all logs hereafter cut by the party of the second part on said timber berth, and the lumber manufactured out of the same, shall be the property of the parties of the first part until the said purchase money is paid to them in full.

5. It is further agreed that the said party of the second part shall at the request of the parties of the first part execute a chattel mortgage in their favour on all goods and chattels owned by the party of the second part, situate on said timber berth 853, or hereafter to be brought upon the said timber berth by him, to secure the unpaid purchase money and interest.

6. It is expressly agreed that time is to be the essence of this contract, and that in default of payment of the said purchase money or any part thereof or of the performance of the said work on the days and times above stipulated, the parties of the first part shall be at liberty to determine and put an end to this agreement and to retain any sum or sums of money paid thereunder and proceeds of work done hereunder, as and by way of liquidated damages, and shall be at liberty to resell the said property. All marginal writing forms part of this agreement.

7. The parties of the first part agree to take over from the party of the second part at his mill all lumber cut by him out of his own logs during season of 1905 at following rates: all rough lumber $13 per 1,000 ft. b.m., all dimension lumber to be sized, and all lumber fit for siding, flooring, or other matched stuff 1 in. thick, at $15 per 1,000 ft. b.m. This section to be read as if part of sec. 2 hereof, and the price of said lumber to be applied in payment of said $8,000.

8. The party of the second part agrees that he will, without delay, assign to the parties of the first part as part payment of said sum of $8,000 at and for the price of $1,000, less amount due thereon to Osler, Hammond, & Nanton on the s.w. ¼ sec. 15, tp. 45, rg. 18, W. 2 M.

9. The party of the second part will cut all shingles out of logs belonging to the parties of the first part at the rate or price of $1.50 per 1,000; the price of cutting shingles is to apply in payment of said $8,000.

10. The parties of the first part are to have the free use and occupation of the building known as the store so long as they shall require the same in the course of their business at said mill."

Plaintiff alleges that he duly performed all his part of the contract, made all the payments and performed all the work and labour and all the other acts provided to be done by him; that the whole was done and performed on or before 1st September, 1905; that on the due performance of such work he paid the defendants $1,585.24 over and above the purchase price; that defendants neglect and refuse to perform their part of the agreement or to transfer the property; that they have so acted in the management of the timber berth that their interest therein is in imminent danger of being forfeited; that he, in the expectation of the agreement being performed, and in good faith, incurred sundry expenses amounting to $1,888.70; and that, by reason of defendants' breach, he has lost profits to the amount of $5,000. He claims repayment of the purchase price, the amount paid by him in excess thereof, and damages for expenses incurred and loss of profit to the amounts already stated.

The trial Judge by his judgment held—

1st. That the lumber manufactured by the plaintiff out of defendants' logs was manufactured in a workmanlike manner and in accordance with the contract, and that defendants are indebted to plaintiff therefor according to the prices stated in the agreement.

2nd. That the lumber manufactured by plaintiff out of the logs cut by him during the summer of 1905 was properly manufactured and in accordance with the contract, and was delivered to defendants, who are liable for the value thereof according to the prices stated in the agreement.

3rd. That defendants wrongfully refused and neglected to perform their part of the contract, and that the contract is terminated.

4th. That plaintiff should, in addition to the amounts referred to in paragraphs 1 and 2, recover from the defendants damages in the sum of $230 for additions made by him

to the machinery, and $100 for prospective loss of profits for the lumber season of 1906, and that defendants should refund to him all purchase money, whether paid in cash, in land, or in any other manner, with interest as claimed.

The judgment also directed that an account should be taken between the parties, the taking thereof to be followed by such order as the Court might deem proper.

The evidence shews that, although the written agreement between the parties was not entered into until March, 1905, they had during the month of November, 1904, entered into a verbal agreement for the sale and purchase of the mill and timber limit for the same price, of which $2,500 was to be paid in cash at that time. A writing embodying the terms then agreed upon was drawn up at that time, but was not executed because the plaintiff was not then prepared to make the down payment. The plaintiff under that verbal agreement entered upon the limit, and during the winter of 1904-5 cut a large quantity of timber thereon, a quantity sufficient, according to his estimate, to yield over 200,000 feet of lumber. The evidence also shews that the logs were cut on the limit by the plaintiff after the written agreement was executed, and the trial Judge was mistaken in his reference in his judgment to logs cut by the plaintiff during the summer of 1905.

About 7th March, 1905, the plaintiff started up the mill upon the premises and proceeded to saw into lumber the logs of the defendants, and also those which he had cut during the preceding winter, and he completed the sawing thereof in June. Defendants took possession of and removed all the lumber manufactured from their logs and about 4,000 feet of that manufactured from those cut by plaintiff, but they refused to accept or remove the remainder of the latter, alleging that it was not such lumber as they were bound by the agreement to accept. They also alleged that the lumber from their own logs had not been manufactured in a workmanlike manner.

Shortly after the completion of the sawing, the plaintiff requested the defendants to perform their part of the agreement by transferring to him the mill and timber limit, but the defendants refused, giving as their reason that the lumber had not been manufactured in accordance with the agreement. Plaintiff shortly afterwards commenced this action.

without having given any notice of his intention to rescind the agreement.

The first question to be considered is whether the trial Judge was right in holding, as he did hold, that the contract was terminated. In his reasons for judgment he has not stated the grounds upon which he so held. It is true that he has stated that it seemed that the defendants were unable at the time the demand was made upon them to assign to the plaintiff their interest in the timber berth, but the statement of claim does not allege that they were unable to do so, nor, to my mind, does the evidence clearly shew such inability. Had the plaintiff in his statement of claim alleged such inability, and claimed that, by reason thereof, he was entitled to rescind the contract, the defendants might have shewn affirmatively, if necessary, that they were in a position to convey, but that question was not put in issue by the pleadings. There is no finding upon the question whether the purchase money was fully paid. That question appears to be left open until after the accounts between the parties should be taken.

There is no evidence to shew that the defendants at any time refused to be bound by the agreement. It is true that they appear to have refused to convey the property, but their refusal was merely upon the ground that they asserted that the price had not been fully paid. It is reasonable to assume that they should be entitled to have that question tried out without being subject to what would be the severe penalty, in case it were found that the price had not been fully paid, of having the property returned to them denuded of a large portion of the timber which constituted its main value.

In Freeth v. Burr, L. R. 9 C. P. 208, Lord Coleridge, C.J., says at p. 213: "The true question is whether the acts and conduct of the party evince an intention to no longer be bound by the contract. Now, non-payment on the one hand or non-delivery on the other may amount to such an act, or may be evidence for a jury of an intention to wholly abandon the contract and set the other party free." In the present case there is nothing to lead to the conclusion that the defendants evinced any desire to abandon the contract, or that they refused to be bound by it. On the contrary, they allege in their statement of defence that they are and always have

been ready and willing to convey the property upon payment of the purchase money.

Even if the plaintiff were entitled to rescission, and the effect of the judgment is that he was so entitled, the trial Judge, in my opinion, erred in holding that plaintiff was entitled to the contract price for manufacturing defendants' logs into lumber, and for the lumber manufactured from his own logs. The effect of rescission would be that the mill and timber limit would remain the property of the defendants, in which case they would be entitled to a reasonable deduction in the case of their own logs for the use of their mill in sawing them into lumber; and in the case of the logs cut by the plaintiff, not only for the use of their mill, but also either for the value of the logs, less the cost of cutting them, or for the amount by which the property was deteriorated by such cutting. The plaintiff would also, in that event, be chargeable with a reasonable occupation rent for the premises, and also with damages for deterioration while he was in possession. It is, to my mind, open to serious doubt whether the general direction in the judgment as to the taking of accounts between the parties would include these matters.

The trial Judge found that the lumber manufactured by plaintiff under the agreement was properly manufactured. While the evidence upon that question was contradictory, there was sufficient evidence to support that conclusion, and the finding, therefore, should not be questioned, were it not for the fact that, in his reasons for judgment, he bases his conclusions upon certain grounds, the sufficiency of which is, in my opinion, open to doubt. He finds that any defect in the work (and there is evidence of certain defects) was due partly to the condition of the machinery of the mill and partly to the frozen condition of the logs at the time the mill was started by the plaintiff, and that the time limited by the agreement for the sawing of defendants' logs prevented him postponing the sawing until the logs were in proper condition.

If plaintiff's agreement to do the work in a proper and workmanlike manner was to be subject to the condition that defects in the workmanship caused by defects in the machinery of the mill at the time the agreement was entered into, should be taken into consideration, I am of opinion that the agreement should have so provided. The evidence

points to the conclusion that such was not the intention of the parties. Defendant Tate and another witness (Gunn) state that at the time the agreement was executed the plaintiff stated that he intended to put in better machinery. He does not deny that he so stated. In fact he admits that he had to put in certain machinery to make the mill a little better and quicker.

The evidence shews that the sawing of both defendants' and plaintiff's logs was completed in about three months from the date of agreement. The plaintiff could, therefore, have postponed the sawing of defendants' logs for at least a like period in order that the condition of the logs might be improved.

The trial Judge appears to have been under the impression that, by the terms of the agreement, plaintiff was bound to complete the sawing of both defendants' logs and his own within the 6 months, but I think it is not open to that construction. It provides merely that defendants shall take over all lumber cut by him from his own logs during the season of 1905. It does not bind him to cut any lumber from these logs during that season, and, even if it had been the intention that he should cut all his own logs during that season, there is nothing to shew when that season ended or to lead to the conclusion that it ended in 6 months from the date of the agreement.

In view of what I have stated, the finding of the trial Judge upon the question of the quality of the lumber should not be deemed conclusive, as it cannot be assumed that he would have reached the same conclusion upon other grounds. It may, therefore, be open to this Court to examine the evidence and decide that question, but, owing to the view I am about to express, I think that it is unnecessary for this Court to do so.

For the reasons I have stated, I am of opinion that the appeal should be allowed with costs, that the judgment appealed against should be set aside, and the following judgment entered in lieu thereof:—

That the agreement between the parties is one that ought to be specifically performed; that it be referred to the trial Judge, or, by his direction, to the clerk of the Court, to ascertain and state whether the purchase money of the property which forms the subject matter of the agreement between the parties has been fully paid; that the balance (if any) found due by the plaintiff be paid by him into Court within

30 days from the date of the report; that, if it be found that the purchase money has already been fully paid, the defendants shall cause the property to be conveyed to the plaintiff within 30 days from the date of the report, or, if found not to have been fully paid, then within 30 days after the payment of the balance thereof into Court; that, if it be found that the payments made by the plaintiff exceed the purchase money, the amount of such excess, as well as the amount of the damages which plaintiff has sustained by reason of defendants not having conveyed at the time such conveyance was demanded by the plaintiff upon completion of the work, shall be ascertained and stated; that upon such inquiries the evidence at the trial may be used as evidence, with liberty to either party to adduce further evidence; that, in case it shall be found that the defendants are unwilling or unable to convey the property, the following further accounts and inquiries are directed:—

1. An account of the damages sustained by the plaintiff by reason of such breach by the defendants.

2. An account of the value of the improvements made by the plaintiff upon the property.

3. An account of the amount which should be paid or allowed by the plaintiff for occupation rent of the property and for any deterioration in the value thereof caused by him.

And that the question of costs, other than the costs of this appeal, be reserved.

The defendants counterclaim for $4,226.74 for damages caused by plaintiff not having manufactured the lumber in accordance with the agreement, for loss of profit in consequence of non-delivery thereof, and for loss of lathes which were not manufactured by plaintiff from defendants' slabs.

The trial Judge dismissed the counterclaim with costs. I think it must be assumed that his view was that, in so far as it relates to defects in the manufacture of the lumber, it must fail because he had already decided that the lumber was properly manufactured. As I have already expressed the opinion that the grounds upon which he so held are untenable, I think he should not have dismissed that portion of the counterclaim upon that ground. As to the portion in respect to the lathes, the only reference to it in his reasons for judgment is a statement that there was no mention of lathes in the agreement. There is, however, some reference in the

evidence to a subsequent verbal agreement respecting them, which he does not appear to have considered.

In my opinion, the judgment upon the counterclaim should be set aside and a new trial ordered, unless the parties agree that the matter of the counterclaim be disposed of upon the reference above directed.

NORTH-WEST PROVINCES.

(REGINA.)

APRIL 30TH, 1907.

FULL COURT.

BLACKSTOCK v. WILLIAMS.

Vendor and Purchaser—Contract for Sale of Land—Specific Performance—Making out Contract—Letter—Offer to Sell or Quotation of Price—Oral Acceptance.

Appeal by plaintiffs from judgment of NEWLANDS, J., 5 W. L. R. 85, dismissing an action for specific performance of a contract.

The appeal was heard by SIFTON, C.J., WETMORE, SCOTT, HARVEY, and STUART, JJ.

F. W. G. Haultain, K.C., for plaintiffs.

N. MacKenzie, Regina, for defendant.

WETMORE, J.:—This is an action for the specific performance of an alleged agreement between the plaintiffs and the defendant for the sale by the defendant to the plaintiffs of lots 36, 37, 38, 39, 40, 41, and 42, in block 287 in the city of Regina.

According to the evidence of the plaintiffs, an interview had taken place between the plaintiff Blackstock and the defendant, wherein Blackstock made the remark that he supposed he (the defendant) would be willing to sell the property in question, and to which the defendant replied, "yes." Nothing definite was arranged at that conversation.

but on 18th April, 1906, the plaintiffs went to the defendant's office, and they again discussed the matter. The plaintiffs made two or three offers for the land. but they were not accepted, and the defendant said he wanted $150 a foot, and he would not sell for less. After some further discussion the defendant stated that he would send the plaintiffs a statement of how he would sell, and later on in the same day he sent them the following written document:

"Regina, April 18th, 1906.

"To Messrs. Blackstock & Co.,
"Regina, Sask.

"Gentlemen,

"The best I can consider upon lots 36, 37, 38, 39, 40, 41, and 42 in block 287, and good up to the 18th inst., at 6 o'clock p.m., is as follows:

175 feet at $150.00 ..... $26,250.00

"Under agreement at the following terms:—

$ 2,500.00 ..... Cash,
$ 3,750.00 ..... June 1st, 1906
$10,000.00 ..... Jan'y 1st, 1907
$10,000,00 ..... June 1st, 1907

"Interest at the rate of 7 per cent. from date of sale.

"Yours very truly,
"R. H. Williams."

The plaintiffs verbally accepted this alleged offer. There is contradictory testimony as to what took place between the plaintiffs and the defendant prior to the sending of that document. I may say, however, in reading the testimony over, I have no doubt that the plaintiffs' version of what took place is correct. After the plaintiffs had so accepted the offer, the defendant by a written letter withdrew his offer.

The question arises whether this offer to sell was binding. There is no ambiguity on the face of this document, and if it constituted a bargain it has got to be gathered within the four corners of the instrument itself. No oral testimony can be received to aid in its construction. If there is not a complete contract to be gathered on the face of the instrument, it is invalid as a contract of sale.

In the light of the authorities, I cannot bring my mind to the conclusion that the document amounts to a contract

of sale; it is merely a statement that the best price the defendant could take into consideration for the sale of the property is $150 a foot, and the terms of the payment to be as stated. In the next place there is no allegation in the document that the defendant would sell to the plaintiffs. Possibly, if the interviews which I have referred to as taking place before this document was forwarded might be considered in aid of the construction of the document, one might arrive at a different conclusion, but, as I have stated, that cannot in law be done. The conclusion I have arrived at is, in my opinion, supported by the judgment of the Judicial Committee of the Privy Council in Harvey v. Facey, [1893] A. C. 552. . . .

Leaving the fact out that the letter to the plaintiffs is merely a consent to consider the question of the sale, in order to make it an agreement to sell to the plaintiffs, words have got to be implied. This case is absolutely binding upon this Court, and I am not able to distinguish the case now under discussion from it. I am therefore of the opinion that this appeal should be dismissed with costs.

JOHNSTONE, J., agreed with WETMORE, J.

HARVEY, J.:—I agree that the judgment should be sustained, but I do so with great reluctance, because I feel satisfied from the evidence that the defendant's letter was intended as an offer, and it is admitted by his counsel that if it was an offer it was accepted. It seems quite clear from the authorities that parol evidence is not admissible to explain a document unless it is ambiguous. If it is not indefinite or ambiguous, the party must be deemed to have intended what he said. I think possibly that the word "consider" might be susceptible of more than one meaning, but the most favourable meaning for the plaintiffs that I find myself able to place on it is that of "accept," and, though all the other terms of the letter appear to me to be more consistent with the view that it is an offer to sell on certain terms open for acceptance for a certain time, yet they are not really inconsistent with the view that it is simply an invitation for an offer, which it is intimated will be accepted if made within the specified time, and the first expression of the letter, "the best I can consider (or accept)," is inconsistent with the former view, for with the only meaning that

can be attached to those words they involve the idea of an offer being made to the writer, otherwise there would be nothing to consider or accept. No such offer having been made, there was no contract.

SIFTON, C.J., and SCOTT, J., concurred.

STUART, J.:—I think the judgment in this case should be sustained and the appeal dismissed. Before a contract can be established it is necessary not only to shew an intention in the party charged to agree, but also to shew an expression of that intention. Even assuming that the defendant intended the letter of 18th April as an offer to sell, which I very much doubt, I am unable to find in the words of the letter any sufficient expression of that intention. The words of the English language have certain recognized meanings, and we are bound to take the words of the letter as we find them, and to give them their ordinary grammatical meaning as they are generally understood by persons using that language. I can find no words in the letter which can be held to express the thought "I will sell you" the property in question.

If the Court were first to consider the surrounding circumstances, and then in the light of these circumstances were to assume to say that the letter as a whole expresses that idea, this would, in my opinion, amount to nothing less than creating a new symbol of language and declaring that that symbol means so and so, or expresses such or such an idea. I do not think the Court is at liberty to do this. In Grey v. Pearson, 6 H. L. C. 106, Lord Wensleydale laid down the well-known rule, now universally followed, in these words: "In construing wills, and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words must be modified so as to avoid that absurdity and inconsistency, but no farther." And in the same case he said further: "The expression that the rule of construction is to be the intention of the testator is apt to lead into error, because that word is capable of being understood in two senses, viz., as descriptive of that which the testator intended to do, and of that which is the meaning of the words he has used. The will must be in

writing, and the only question is what is the meaning of the words used in that writing." He was speaking there of a will, but it is well known that even a wider latitude is allowed in the case of a will than in the case of other documents. The author of the Encyclopædia of the Laws of England, in referring to this case, says (vol. 7, p. 31): "In other words, the question always is, 'what did the writer mean by that which he wrote?' not 'what did the writer mean to say?'"

In the same volume of the Encyclopædia of the Laws of England, at p. 33, it is laid down as follows: "Where the meanings of the words used in a document are in their primary meanings unambiguous (Cholmondeley v. Clinton, 2 Mer. at p. 344, 16 R. R. 167), and when such meanings are not excluded by the context, and are sensible with respect to the circumstances of the parties at the time of execution, such primary meanings must be taken to be those in which the words were used."

Applying these rules to the document in question, it seems to me that there can only be one possible interpretation to put upon it. The words "the best I can consider" are not strange, unusual, or technical. They are common, plain, English words, and I cannot see how any one can entertain a doubt as to what they mean. Indeed, in order to state their meaning, I would simply have to repeat them, because no words, to my mind, could be plainer in meaning. The same must be said of the words "good up to the 19th inst. at 6 o'clock p.m." These words plainly must be read in connection with the previous words. I can entertain no doubt whatever that their meaning is simply that after that hour the best he could consider might be something different.

It is said the words are ambiguous. But I can see no ambiguity whatever; therefore no explanation to my mind is necessary outside of the words themselves. It seems to me that when ambiguity is suggested what is really meant is this,—that having first travelled beyond the document and considered the surrounding circumstances, and having conceived a suspicion in that way that the defendant meant to make an offer to sell, we feel a doubt arising in our minds as to whether the defendant actually said what he meant to say. That is a very different thing from an ambiguity arising on the face of the document itself. I cannot entertain any doubt as to the meaning of the words used, considered in themselves, and that being so, I do not think we are permitted to go beyond the document in order to discover

another meaning. In the Encyclopædia, vol. 7, p. 34, it is stated: "Evidence that the writer employed the words in a special meaning is not admissible, as this would be interpreting his intentions as expressed in the document, together with intentions not expressed in it." The author refers to the case of Shore v. Wilson, 9 Cl. & Fin. 512, where the rules for the interpretation of documents were laid down very carefully by the House of Lords. In that case Mr. Justice Erskine, one of the advising Judges, said: "But, subject to these qualifications, whenever the words employed bear a definite known meaning and are capable of being applied according to their plain and ordinary meaning, no evidence is, in my opinion, admissible to shew that the party intended to use them in a more extended or in a more qualified sense; for otherwise every man's will and intention, however expressed, would be liable to be defeated, not, as is now sometimes the case, by his own defective expression of that will, but contrary to his own plainly declared intention." The qualifications here referred to are mentioned in previous paragraphs and consist of (a) the case of technical terms, (b) the case where the terms, though not technical, cannot otherwise be applied at all unless an enlarged or limited construction be given. In the latter case, the judgment says: "It is always allowable, in order to enable the Court to apply the instrument to its proper object, to receive evidence of the circumstances by which the testator or founder was surrounded at the date of the execution of the instrument in question, not for the purpose of giving effect to any intention of the writer not expressed in the deed, but for the purpose of ascertaining what was the intention evidenced by the expressions used; to ascertain what the party has said; not to give effect to any intention which he has failed to express."

It seems to me that these rules preclude us from going outside of the letter in question, because it is quite easy to apply the words used as they stand, and there can be no question of difficulty in "applying the instrument to its proper object." Much stress is laid upon the use by the defendant of the word "offer" in his subsequent letter. But not only do the rules already quoted forbid consideration of this letter, but there are other authorities to the same effect which are more peculiarly applicable to it. In Lewis v. Nicholson, 18 Q. B. at p. 510, Lord Campbell, C.J., said: "It is always legitimate to look at all the co-existing cir-

cumstances in order to apply the language and so to construe the contract; but subsequent declarations shewing what the party supposed to be the effect of the contract are not admissible to construe it." And in the same case Erle, J., said at p. 514: "I think that subsequent admissions, whether in writing or not, are not to be taken into account by us in construing the written instrument in which the contract was contained." And Wightman, J., said: "Now, I think that, if we look only at the legitimate evidence of the contract, there is no ambiguity at all. It all depends on the two letters; these formed the complete contract; and no subsequent statements, written or verbal, can have any effect on the construction of the contract already complete." These passages are cited in a late work, Beal on Legal Interpretation, at p. 58, and, again, I think preclude any consideration of the second letter. Moreover, that letter was written after the defendant had told the plaintiffs to keep their cheque, and had definitely refused to proceed with the deal. It is true, Smith says that he promised to call in the evening "to fix it up," but the defendant denies this, and it seems to me his acknowledged refusal of the cheque rather favours the defendant's account of what then occurred. The fight was evidently beginning, and, that being so, I think, as stated by Boyd, C., in Bradley v. Elliott, 11 O. L. R. at p. 398, 7 O. W. R. 137, "the defendant ought not to be held too strictly to his (her) comments on what had happened as if he (she) were acting under advice." Moreover, even considering the extrinsic evidence, I must confess that I still have some doubt as to what the defendant really intended. The evidence shews clearly that every advance or approach was made not by Williams but by the plaintiffs. It was they who were evidently eager to deal. Their account of what happened at the two previous interviews shews clearly, to my mind, that it was they who were making the offers and not the defendant. Blackstock admits that he can give only the "practical drift" of the second conversation, and the most he can say is that he "left the defendants with a statement from him that he would send up a statement of how he would sell." Smith goes no further than this, and I seriously doubt whether we are justified from such evidence in inferring anything more than that Williams promised to send them his price. This is all I can gather from the letter that he actually did, and it is settled that a mere statement of price is not sufficient: Harvey v. Facey, [1893] A. C. 552.

The only conceivable ground on which the plaintiffs could possibly succeed is, to my mind, this: that the Court should find that the defendant intended to make an offer to sell, that therefore his letter must, to his mind, have contained an offer to sell, that the plaintiffs so understood it, and that therefore there was a consensus or meeting of minds, which would in the particular case be sufficient, no matter how defective the language of the letter may be. But this reasoning would clearly infringe the rules of interpretation which I have already quoted, because it would involve, firstly, travelling beyond the instrument to ascertain intention, in a case where such a course is not necessary and therefore not permissible; and secondly, it would amount to saying that, because the defendant meant to say a certain thing, therefore he must be held to have said it—a course which is also not permissible.

I think therefore the appeal should be dismissed.

NORTH-WEST PROVINCES.

(REGINA.)

APRIL 30TH, 1907.

FULL COURT.

DUNDAS v. OSMENT.

Landlord and Tenant — Chattels Left on Premises by Tenant—Abandonment — Fixtures — Detinue — Overholding Tenant — Notice to Quit — Bona Fide Belief in Right to Retain Possession—Double the Yearly Value of Premises —Breach of Covenant to Repair — Taxes—Judgment in Previous Action—Reasons for—Evidence.

Appeal by plaintiff from judgment of NEWLANDS, J., 4 W. L. R. 116.

N. Mackenzie, Regina, for plaintiff.

J. T. Allan, Regina, for defendant.

The judgment of the Court (SIFTON, C.J., WETMORE, SCOTT, HARVEY, and STUART, JJ.), was delivered by

WETMORE, J.:—This is an appeal from the judgment of my brother Newlands. The plaintiff claims to recover for the value of one acetylene gas machine and attachments and fittings, tables and shelving, 17 stair pads, one bath and fittings, and hot water apparatus.

The first paragraph of the statement of claim is for unlawful detention of these articles; the second is for wrongful conversion of the same; the third, fourth, and fifth allege that one Adam Davidson, about the month of May, 1900, sold to the defendant, Osment, the articles in question, and that the defendant agreed with Davidson that he would accept them and pay for the same on getting possession thereof and the hotel, called the Royal Hotel, in which they were; that the defendant afterwards took possession of the hotel and the said articles and sold them to one Margaret Macgregor, and that subsequently and before action brought, Davidson, by writing under seal, assigned to the plaintiff all his right, title, and interest in the moneys arising from the sale of the articles by Davidson to the defendant. The claim goes on to allege that the defendant has not paid such moneys.

Plaintiff's counsel, at the argument of the appeal, conceded that all the articles above mentioned were fixtures with the exception of the stair pads. He also conceded that the plaintiff had no right to recover with respect to those articles under the first and second paragraphs of the claim. That is, he conceded that an action would not lie in respect to these articles for the unlawful detention or conversion of them. It is not necessary for this Court, therefore, to consider that question any further, but accept his view of the law with respect to all the articles mentioned except the stair pads. But he contended that the plaintiff had the right to recover the value of these fixtures under the third and fourth and fifth paragraphs of the claim. As a matter of fact, the matters set forth in these paragraphs were not *proved*. There was no proof of a sale by Davidson to the *defe*ndant as alleged, or any agreement on the part of the defendant to accept these articles from Davidson and pay for them; and there was no evidence that Davidson ever assigned his rights to the moneys arising out of such sale to the plaintiff. This point was not raised by the counsel for the defendant. Both parties seemed to proceed at the trial as if, under the pleadings, the plaintiff would be entitled to recover the value of these articles provided he could estab-

lish a right to do so. As a matter of fact, the whole contention on the plaintiff's part was that he was a tenant of the defendant of the hotel, that the articles in question were put in by tenants of such hotel who preceded the plaintiff, and who, by a chain of two or three assignments, vested in him the articles in question, and that as outgoing tenant he had a right to take them, and that he was prevented from so doing by the defendant.

With respect to the stair pads, I am of opinion that they were not fixtures; they were simply rubber pads placed one on each stair, and were tacked down to prevent them from slipping and to keep them in place. They were no more fixtures to my mind than an ordinary carpet which was tacked down in a room would be, and it is clear that that is not a fixture. The value of these pads when new was about 50 cents each; there were 17 of them. They were greatly worn and reduced in value at the time the plaintiff left the hotel, and I am of opinion that $4.50 would be an ample price for them. I am of opinion, for the reason that will appear hereafter, that the plaintiff abandoned his right to these pads, and therefore is not entitled to recover for them.

As to the other articles. The plaintiff was in occupation of this hotel under a lease from the defendant dated 8th May, 1902, for the term of one year, to be computed from 1st July then next. This lease contained a clause whereby it was provided that the term thereby granted might be terminated by either party giving to the other a month's notice in writing of his intention to terminate the tenancy. On 22nd January, 1903, defendant gave plaintiff notice to quit on 28th February then next. The plaintiff continuing in possession of the premises, proceedings were thereupon had by originating summons before Mr. Justice Richardson, then one of the Judges of this Court, who, on 27th March, 1903, made an order that the plaintiff do forthwith deliver up to the defendant possession of the lands and premises in question. Prior to making this order, the learned Judge gave a written judgment setting forth his reasons and grounds for making the order.

At the argument of this appeal there was considerable discussion as to the right of the trial Judge herein to look at this judgment. It was urged in the first place that the formal order, or judgment, was not in evidence. As a matter of fact, this formal judgment, or order, did not appear in the appeal book. The trial Judge's judgment seemed to

indicate that this order was before him, and on consulting him it evidently appeared from his statements and his note book that a certified copy of this order was put in evidence and was before him, as was also a certified copy of the judgment of the Court en banc dismissing an appeal in the matter. Upon this Court being possessed of these facts, it was held that these documents should be used as being part of the material before the Court on this appeal. Now, the formal judgment being proved, it was competent for the trial Judge and for this Court to inspect the written judgment of Judge Richardson to ascertain the grounds upon which he made the order; or, in other words, to ascertain what adjudication he made. This is supported by Vice-Chancellor Hall in Lord Tredegar v. Windus, L. R. 19 Eq. 25, 612; Houston v. Marquis of Sligo, 29 Ch. D. 448; Barber v. McCuaig, 31 O. R. 593; and In re Graydon, [1896] 1 Q. B. 417.

Judge Richardson held that the plaintiff was an overholding tenant, that the notice to quit (to which I have referred) terminated the tenancy, and therefore that the then plaintiff and now defendant was entitled to possession of the premises in question. Notwithstanding this judgment, however, the plaintiff continued to hold possession of the premises until 7th June, 1903, when the sheriff took possession and ejected him under a writ of possession issued under the Judge's order. Up to that time the plaintiff had not removed these fixtures or his personal effects, and he made no effort to do so until after the sheriff put him out. The sheriff did not, on 7th June, put all the plaintiff's personal property out of the hotel, but, at the request of the plaintiff, he put a man named Sample in possession as his bailiff, and with the consent of the defendant he gave the plaintiff 8 days to take his property out.

I have intimated that the plaintiff took steps to appeal from the judgment of Richardson, J., but he did not prosecute his appeal with effect, and the Court dismissed it. The plaintiff, therefore, to my mind, was clearly an overholding tenant. It was declared practically that his lease determined on 28th February, and he had no right to continue in there any longer, and he was a trespasser. Under such circumstances, he was not in a position to move his fixtures after the sheriff had ejected him, and the permission which was given to him to remove his goods was not a continuation of the tenancy,—it was merely an indulgence, a license, it

might be called, to take his property away during the period fixed. That would only include movable property that he had the right to take away, and could not be construed into a right to take away fixtures. But, apart from that, as stated by the trial Judge, fixtures which a tenant is entitled to remove must be removed during the tenancy. If they are not removed during the tenancy, the property in them vests in the owner of the reversion. The right of removal also exists for such time beyond the original term as he holds the premises under a right still to consider himself as a tenant, but the right of removal after the termination of the lease does not exist where he retains possession wrongfully. And for that the learned Judge cites Barff v. Probyn, 11 Times L. R. 467; Meux v. Jacobs, L. R. 7 H. L. 490; Pugh v. Arton, L. R. 8 Eq. 626. The first case is especially in point, and was decided by Mr. Justice Charles, a very able Judge, and is comparatively a late case. I would also draw attention to what was laid down in Weston v. Woodcock, 7 M. & W. at p. 19: "The rule to be collected from the several cases decided on this subject seems to be this, that the tenant's right to remove fixtures continues during his original term and during such further period of possession by him as he holds the premises under a right *still to consider himself as tenant.*" Clearly the plaintiff, in view of Judge Richardson's judgment, could not consider that he was holding the premises under a right still to consider himself as tenant. That case is referred to in the note to Elwis v. Maw, Smith's Leading Cases, 10th ed., at p. 212, and seems to be recognized as good law.

It appeared in evidence that some verbal communication had taken place between defendant and Andrew Dundas junior, the son of the plaintiff, respecting these fixtures, and that the defendant had offered to pay $40 for these articles, to be applied towards cleaning up the premises and repairing them. It was urged that this was a recognition of the plaintiff's right to these articles. I cannot view it in that light. It was merely an offer—and it seems to me an offer made by way of settlement of their difficulties. The plaintiff repudiated this agreement altogether, and he says that his son had no right to make any bargain of the kind, and the son denied that any such agreement was made. The offer therefore falls to the ground. The plaintiff cannot repudiate it so far as he is concerned, and hold the defendant to it so far as he is concerned.

Although what I have hereinbefore stated disposes, to my mind, of the question of the plaintiff's right to recover, in so far at any rate as the fixtures are concerned, it may be as well to refer to another contention, which would not only fix the right to recover with respect to these fixtures, but would fix the right to recover with respect to the pads. The plaintiff sets up that he was prevented from removing all these articles in question because Sample told him he was not to remove fixtures, or things attached to the walls or the building. Now these directions given by Sample were given with the approval of the defendant, but the directions were of a general character; there was no particular article specified that he should not remove, nor did the plaintiff insist upon removing any particular article. He did not, for instance, point out any article and state that he had the right to remove it, and insist upon it. He took what articles he desired to take, and when he got through he informed Sample that he had everything out. I do not consider that a refusal to allow him to take away the articles. I think, he being an outgoing tenant, if he claimed these articles, or if he claimed the right to remove them as tenant's fixtures, he ought to have specified them; and not having done so his right to take them was gone. We have no further demand with respect to them until 29th December, 1903, more than 6 months afterwards.

It is for these reasons that I have held that, having left the stair pads behind him, under the circumstances he abandoned them. I think the trial Judge was correct in giving judgment for the defendant on the plaintiff's claim.

The defendant counterclaimed for double the yearly value of the lands under 4 Geo. II. ch. 28, sec. 1, and the trial Judge found for the defendant. The plaintiff also appeals from this decision.

The only demand in writing under this section was the notice to quit hereinbefore referred to. That notice did not contain a demand in specific terms; it merely was a notice to quit and deliver up possession on 28th February, 1903. It has been repeatedly held that this is a sufficient demand, the notice being to deliver up possession on a specified day. Hirst v. Horn, 6 M. & W. 393 went further; the notice required the defendant to quit the farm in question "on the first day of July then next or on such other day as their holding should expire next after the expiration of half a year after the receipt of that notice." The Court held that

the notice was sufficient demand under the Act. Parke, B., says at p. 395: "It is clear this was a good notice to quit in order to determine a tenancy from year to year. It is a form which has long been adopted in order to prevent the effect of any mistake in the statement of the time when the tenancy expires, and it is equally a sufficient demand of possession."

In order to render a party liable for double the yearly value of the premises under the Act in question, the holding over must be wilful and contumacious. The question of the wilfulness of the holding is a question of fact, and I am of opinion that there was evidence to warrant the trial Judge in reaching the conclusion he did, and I am not disposed to interfere with his finding. It was urged that he rested some of his conclusions upon the written judgment of Richardson, J. The question of the wilfulness and contumacy of the plaintiff was not a question before Richardson, J., but the nature and character of his defence would be an element for consideration by Newlands, J., in deciding whether or not the proceedings before that Judge were bona fide, and I am of opinion that the trial Judge was at liberty to have recourse to the judgment of Richardson, J., for the purpose of ascertaining what questions were raised before him. When I consider that the lease under which the plaintiff claimed contained a clause enabling either party to determine at a month's notice, and that he had executed another lease of the same premises on 27th February, 1902, in which there was a clause enabling the lessor to terminate the lease on 30 days' notice, in the event of his making a sale of the demised premises; that he started an appeal from Judge Richardson's judgment to the Court en banc, which he either pressed so negligently or abandoned that the Court en banc dismissed the appeal, and that, notwithstanding all this, the plaintiff held possession of the premises until he was evicted by process of law, I am not surprised that the trial Judge came to the conclusion that the holding over was wilful and contumacious. But there is, in my opinion, an error in the amount awarded for double the yearly value of the premises. This has been computed from 8th March to 13th June. I think it should be computed from 1st March, 1903, the day after the notice to quit expired, to 7th June, when the sheriff took possession. That would be 3 months and 6 days. The double yearly value of the premises, therefore, would be $800, and

deducting from that the amount taken out of Court by the defendant without prejudice, $391.67, leaves a balance of $408.33, for which amount there should be judgment for the defendant. In my opinion, therefore, the appeal as to the plaintiff's claim should be dismissed and the judgment for the defendant on the counterclaim should be varied by reducing it from $429 to $408.33. The plaintiff should pay the defendant's costs of this appeal. The plaintiff did not appeal to the Court on the ground that the amount awarded on the counterclaim was more than warranted; his appeal was confined altogether to the defendant's right to recover anything. The question of the Judge having awarded too much came out incidentally in the course of the argument by the respondent's counsel. Under such circumstances, I am of opinion that the plaintiff should pay the defendant's costs of this appeal.

NORTH-WEST PROVINCES.

(REGINA.)

APRIL 30TH, 1907.

FULL COURT.

TUCKER v. ARMOUR.

Landlord and Tenant—Lease—Assignment—Non-registration—Land Titles Act—Rent in Arrears—Re-entry by Landlord—Action by Assignee of Lease to Recover Possession—Parties—Original Lessee — Subletting by Assignee—Termination of Sublease — Fraud—Pleading—Payment of Rent—Costs.

Appeal by defendant from judgment of NEWLANDS, J., 5 W. L. R. 35.

D. J. Thom, Regina, for defendant.

A. L. Gordon, Regina, for plaintiff.

The judgment of the Court (SIFTON, C.J., SCOTT, PRENDERGAST, HARVEY, and STUART, JJ.), was delivered by

SCOTT, J.:—On 18th October, 1904, defendant was the owner of and held a certificate of title to the premises in ques-

tion. On that day he leased them to one Herbert Tucker for a term of 10 years from 23rd March, 1903, at a monthly rent of $12, the lease being duly registered and a memorandum thereof being indorsed upon defendant's certificate of title. Herbert Tucker afterwards assigned his interest in the lease to plaintiff, but the assignment has not been registered. The plaintiff sublet the premises to one Glasserman for 6 months from 15th September, 1905, at a rental payable monthly. On 6th March, 1906, there being then 3 months' rent due by plaintiff to defendant, the latter took possession of the premises. A few days later, plaintiff tendered the overdue rent to defendant, who refused to accept the same or give up possession.

The trial Judge held that plaintiff was entitled to possession of the premises, subject to the payment of arrears of rent, and he directed a reference to ascertain the amount.

The appellant contends that the assignment by Herbert Tucker to plaintiff, not having been registered, did not operate as a transfer of any interest in the lease to plaintiff, and he, therefore, is not entitled to claim under it.

I am of opinion that the trial Judge was right in the view he expressed that the principle laid down in Wilkie v. Jellett, 2 Terr L. R. 133, is applicable as well to the Land Titles Act as to the Territories Real Property Act, and that, therefore, the assignment, though unregistered, transferred to the plaintiff all the interest of the original lessee. I also agree with the trial Judge and the view expressed by him that the original lessee was not a necessary party to the action.

Another contention is that, as plaintiff had sublet to Glasserman for a term which had not expired when this action was commenced, plaintiff had not then the right to possession, and, therefore, could not maintain an action to recover it.

Defendant having taken possession under a forfeiture for non-payment of rent, the plaintiff was entitled to come to this Court to obtain relief against the forfeiture. I think he was entitled to do so without waiting until Glasserman's term had expired. His reversionary interest was immediately affected by defendant's act, and he should be in a position to take immediate steps to protect it. It may be said that he could obtain a judgment protecting his interests without obtaining an order for possession, but I do not see why, if relief is granted to any extent, he should not be de-

cleared entitled to possession except as against Glasserman. If plaintiff is entitled to possession as against the defendant and "all the world" except Glasserman, it appears to me that it would be unreasonable that the defendant should be permitted to shelter himself under the plea that Glasserman may have that right as against the plaintiff. The effect of a sublease is that the tenant stands in the position of a landlord to his subtenant (see Bell's Landlord & Tenant, p. 470), and, as the possession of a tenant is that of his landlord, why should not the right of possession of the subtenant be that of the tenant except as against the subtenant?

Another contention of the appellant is that plaintiff's claim is based entirely upon fraud, and, as the charges of fraud were abandoned at the trial, the action should have been dismissed.

I agree with the trial Judge that, even if the charges of fraud were struck out of the statement of claim, it discloses a cause or causes of action, and that, under it, the Court might, in its discretion, grant relief against the forfeiture for non-payment of rent.

In my opinion the appeal should be dismissed with costs.

NORTH-WEST PROVINCES.

(REGINA.)

APRIL 30TH, 1907.

FULL COURT.

CLIPSHAM v. GRAND PRAIRIE SCHOOL DISTRICT No. 833.

Public Schools—Dismissal of Teacher by Trustees—Appeal to Commissioner of Education — Affirmance or Non-reversal of Dismissal—Right to Alter Decision—Grounds of Decision — Salary of Teacher—Evidence—Certificate of Acting Deputy Commissioner—Engagement of Teacher—Minutes of School Board.

Appeal by plaintiff from judgment of NEWLANDS, J., 3 W. L. R. 313.

W. B. Willoughby, Moose Jaw, for plaintiff.

C. E. Armstrong, Moose Jaw, for defendants.

The judgment of the Court (SIFTON, C.J., SCOTT, HARVEY, JOHNSTONE, and STUART, JJ.), was delivered by

JOHNSTONE, J.:—The appellant was engaged by the respondents as their teacher on 30th May, 1904, for one year, at a salary of $600, and shortly thereafter entered upon his duties and as such teacher continued with the respondents until 3rd January, 1905, when he was dismissed for alleged immoral conduct. The trustees of the board having refused to pay the salary for the year in full, to which the appellant claimed to be entitled, he brought an action for wrongful dismissal and for salary for the unexpired period of the engagement, some 4 months. To the statement of claim the respondents set up, with other defences, the following:—

1. Denying the contract.

2. The wrongful dismissal alleged.

3. That the appellant never had been engaged as a teacher by the respondents under the authority or resolution of the board of trustees passed at a regular or special meeting thereof.

4. That the appellant had been dismissed for cause by the respondents, and he appealed from the action of the board to the commissioner of education, by whom the decision of the board had not been reversed.

The action came on for trial at Moose Jaw on 23rd January, 1906, and judgment was reserved. Judgment was rendered on 23rd March, 1906, in favour of the respondents with costs, upon grounds fully set out in the written judgment of the trial Judge. Against this judgment plaintiff appealed.

At the trial evidence was given of a contract in the prescribed form duly executed by the chairman of the respondents' school board and by one of the trustees thereof, with the seal of the respondents attached. The signatures of the chairman and trustee signing for the board and that of the appellant were witnessed by the remaining trustee. By this contract the appellant became engaged to teach from 30th May, 1904 (the date of the contract), for one year, at a salary of $600, and he thereupon entered upon and continued in the performance of his duties as such teacher until 3rd January, 1905, when he was dismissed for alleged immoral conduct. From this action of the board the teacher appealed to the commissioner of education under the provisions of sec. 153 of the School Ordinance, which reads:

"153. Any teacher who has been suspended or dismissed by the board may appeal to the commissioner, who shall have power to take evidence and confirm or reverse the decision of the board, and in case of reversal, he may order the reinstatement of the teacher." The deputy commissioner caused an investigation or inquiry to be made as to the truth or falsity of the charge by one of the officials of the department, with the result that a decision upon the evidence obtained by this official was arrived at, as appears from exhibits A and B filed.

These read as follows:

"Exhibit A.

"Government of the North-West Territories—Department of Education.

"Regina, March 3rd, 1905.

"Sir,—I am directed to inform you that Mr. McColl's report has been received, and that it has been decided to reverse the decision of the board of trustees of the Grand Prairie School District, on the ground that there was not sufficient justification for their action in dismissing you as teacher. It is believed, however, that your conduct on the occasion referred to was not without blame, and for that reason it has been thought advisable not to reinstate you as teacher in this school. As your influence in the community has become more or less weakened, and as you should have little difficulty in securing another school, the trustees are being advised by to-day's mail that they are at liberty to engage another teacher.

"Your obedient servant,

"J. A. Calder,

"Deputy Commissioner."

"Thos. R. Clipsham,
"Caron, Assa."

Exhibit B.

"Government of the North-West Territories—Department of Education.

"Regina, March 3rd, 1905.

"Sir,—I beg to inform you that Mr. McColl's report on the investigation recently held at your school has been re-

ceived, and that the commissioner of education has decided that your trustees are not justified in the action they took in dismissing their teacher. In so far, therefore, as the grounds of dismissal are concerned, the decision of your board has been reversed. While Mr. Clipsham's action may have been thoughtless, there was absolutely no evidence to shew that he had any unlawful or immoral intent. Doubtless, however, his influence in your community has become more or less weakened, and, for this reason, it has been decided to permit your trustees to engage another teacher.

"Your obedient servant,
"J. A. Calder,
"Deputy Commissioner."

"Jas. La Londe, Esq.,
"Westview, Assa."

In answer to an inquiry from the secretary-treasurer of the respondents, the deputy commissioner wrote as follows:—

Exhibit C.

"Government of the North-West Territories of Canada—
Department of Education.

"Regina, March 9th, 1905.

"Sir,—I beg to acknowledge yours of the 6th instant relative to salary due Mr. Clipsham. With reference to the case in question I beg to say that the department decided that Mr. Clipsham should receive no salary from the date of his dismissal.

"Your obedient servant,
"J. A. Calder,
"Deputy Commissioner."

"Jas. S. La Londe, Esq.,
"Westview, Assa."

No further communications took place between the respondents and the department of education, but, after action was brought, the following communication was sent to one of the advocates for the respondents:—

Exhibit 3.

"Government of the North-West Territories of Canada—
Department of Education.

"Regina, March 16th, 1905.

"Sir,—I beg to acknowledge receipt of your letter of the 13th instant in reference to Mr. Cilpsham's claim against

the Grand Prairie School District, and to state in reply that the commissioner did not order the reinstatement of the teacher by sec. 153 of the School Ordinance. In fact, the trustees were advised that they were at liberty to engage another teacher. The action of the board in dismissing Mr. Clipsham has not been reversed. They were simply advised that the commissioner had decided that they were not justified in the action they took. As, however, Mr. Clipsham was not altogether free from blame, and as it was believed that his influence in the community has been considerably weakened, the commissioner did not think it advisable to reverse the decision of the board in order that the teacher might have a claim for salary from the date of dismissal. If you will note carefully the provisions of sec. 153 of the School Ordinance, you will note the effect of the decision on the point at issue.

"Your obedient servant,
"J. A. Calder,
"Deputy Commissioner."

"Wm. Grayson, Esq.,
"Barrister, etc.
"Moose Jaw."

The certificate of the acting deputy commissioner of education was also given and received in evidence, though objected to by counsel for the appellant. This is in the following words:

"Government of the North-West Territories of Canada—
Department of Education.

"Regina, March 24th, 1905.

"This is to certify that the board of trustees of the Grand Prairie School District No. 833 of the North-West Territories dismissed their teacher, Mr. Thomas R. Clipsham, on or about Thursday January 5th, 1905; that the said teacher appealed from the action of the said board, as provided by sec. 153 of the School Ordinance; that the said appeal was duly investigated, heard, and considered; and that the commissioner of education did not reverse the decision of the said board.

"D. S. MacKenzie,
(Seal) "Acting Deputy Commissioner of Education."

The appeal of the teacher to the [illegible] against the right of the respondents to [illegible]

to dismiss him upon the ground or for the reason set out in the notice of dismissal, namely, for immoral conduct. The finding of the deputy commissioner, as expressed in exhibits A and B, was clearly that the evidence adduced before the board and the deputy commissioner was insufficient to justify the appellant's dismissal by the board for the alleged cause, and, this being the question before the commissioner, and the only one which could be considered by him, the conclusion arrived at, as contained in his letters A and B, had no other effect than that of reversing the action of the board appealed from, and in no sense could the determination referred to be construed as confirming or sustaining the action of the board so as to bring the case within sec. 153, and thereby enable the trustees to take advantage of the provision relating to non-payment of the salary for the balance of the term of hiring.

In my opinion, the deputy commissioner, in so holding the evidence insufficient to justify the dismissal, and in perfecting this his adjudication through his having sent out communications exhibits A and B to the parties directly concerned, which formal communications, under the signature of the deputy commissioner, constitute the sole and only record, according to his own statement, of his disposition of the appeal, could not thereafter deal with the matter in a manner entirely repugnant to and in reversal of his judgment of 3rd March. His adjudication of 3rd March, 1904, neither confirmed nor sustained the decision of the board; and it does not appear from any subsequent action on the part of the commissioner or deputy commissioner that the decision of the board was ever confirmed or sustained.

It will be seen that the certificate of the acting deputy commissioner goes no further than to say, "The commissioner of education did not reverse the decision of the board." This is quite true, when it is remembered that the commissioner never dealt with the matter, as appears from the evidence given by him at the trial.

But, assuming that the acting deputy commissioner in granting this certificate made a mistake in using the word "commissioner," and was referring to "deputy commissioner," I am convinced, after perusal of the evidence of the deputy commissioner, and taking into consideration the circumstances (also in evidence) under which this certificate was granted, that it was at most a declaration by the acting deputy commissioner of the construction which should be

placed upon the adjudication as contained in A and B. The deputy commissioner did not dictate or sign this certificate. In fact he never saw it.

I am in full accord with the opinion expressed by the trial Judge as to the effect of exhibits A and B alone, but with his ruling in admitting the certificate in question in evidence and in giving to it the weight he did, I cannot agree.

As to the extent to which a judgment may be varied, altered, or amended, I refer to Preston Banking Co. v. Allsup, [1895] 1 Ch. 141, and cases therein referred to.

It was open to the respondents at the trial to have given evidence of misconduct of the appellant, without regard to the conclusions arrived at by the deputy commissioner as to the appeal, and, as no such evidence was given or tendered, and in view of what I have stated as to the effect of the commissioner's adjudication, the defence of dismissal for cause relied upon by the respondents, in my opinion, fails.

As to the remaining defence relied upon, namely, that the appellant never was engaged under the authority or resolution of the school board passed at a regular or special meeting, in support of which some evidence was given by the respondents at the trial, I am of opinion that this also fails for the following reasons:—

It is provided with reference to the contract of engagement of the teacher by a school board, by sec. 152 of the School Ordinance as follows: "The contract shall be deemed valid and binding if signed by the teacher and by the chairman on behalf of the board."

Apart from the ordinary rule as to onus of proof, this provision cast upon the defendants in the Court below the onus of proving that the formalities required by sec. 91 of the Ordinance, as to the calling of meetings of the school board whereat the teacher was engaged, had not been complied with.

The evidence adduced was, in my opinion, insufficient for this purpose, and the contract, therefore, must be considered a valid and binding contract.

An examination of the minutes recorded in the minute book of the respondents, produced and given in evidence at the trial, shews the proceedings had at two meetings of the board of school trustees, one on 7th June and the other the previous meeting of the board, at both of which meetings the subject of the engagement of a teacher for the district

came up. At the first of these, which was a meeting regularly held, as is shewn by the minutes, a resolution was passed authorizing and empowering two of the trustees to engage a teacher for a year.

On 7th June the minutes contain a resolution adopting the contract of 30th May. I think if this meeting of 7th June never had been held, the contract would, notwithstanding, be a valid and binding contract, because of what took place at the first mentioned meeting.

The plaintiff states that he received another engagement on 1st April, so that he would not be entitled to be paid under this contract for the months of April and May. It does not appear from the evidence clearly how much the plaintiff had received, but by his claim he asks for $183.70, as the balance due him under the whole contract. This is not denied and may be assumed to be correct. The amount of the salary pertaining to the months of April and May should be deducted from this amount. Under sec. 155 of the School Ordinance, there being 38 teaching days in those two months, this amount would be $108.55, and the balance due the plaintiff would be $75.15.

In my opinion, the appeal should be allowed with costs and a verdict directed to be entered for plaintiff in the Court below for $75.15 with costs of suit.

NORTH-WEST PROVINCES.

(REGINA.)

APRIL 30TH, 1907.

FULL COURT.

WOODLEY v. HARKER.

Attachment of Debts — Garnishee Disputing Liability—Application by Defendant for Order to Determine Question of Liability—Status of Defendant—Rule 390—"Plaintiff or any other Person Interested"—Refusal of Order—Discretion—Appeal.

Appeal by defendant from an order of JOHNSTONE, J. The plaintiffs, Woodley and Sharpe, sued W. Harker, the

defendant, for a debt, and brought McRobert Brothers before the Court as garnishees. A garnishee summons having been served upon the garnishees, they entered with the clerk a statement disputing their liability to defendant. The defendant thereupon applied to JOHNSTONE, J., under Rule 390 of the Judicature Ordinance, for an order to fix a time and place for summarily determining the question of such liability. The application was refused, and defendant appealed.

The appeal was heard by SIFTON, C.J., WETMORE, SCOTT, NEWLANDS, HARVEY, and STUART, JJ.

G. E. Taylor, Moose Jaw, for defendant.

W. B. Willoughby, Moose Jaw, for garnishees.

WETMORE, J.:—Rule 390 is as follows: "If the garnishee dispute his liability or claims that the debt is not attachable, he shall enter with the clerk, within the time specified in the summons or such further time as the Judge may allow, a statement shewing the grounds on which he disputes liability or claims that the debt is not attachable. After which, on application of the plaintiff or any other person interested, on two days' notice given to the garnishee, the Judge may fix a time and place for summarily determining the question of liability or whether the debt is attachable, as the case may be; or may order that any issue or question necessary for determining such liability, or whether the debt is attachable, be tried and determined in any manner in which any issue or question or any action may be tried or determined, and may direct who shall be the parties to such issue or question."

There have been some important alterations in the law affecting this question since the Judicature Ordinance of 1893. Sections 368 and 369 of the Ordinance of 1893 were the sections that provided for the issuing and service of a garnishee summons. These sections had no provision for service of the summons upon the defendant. The provision for service upon a defendant was first introduced by sec. 2 of Ordinance No. 21 of 1896. Section 1 of Ordinance No. 6 of 1897 (47) repealed secs. 368 and 369, as amended by such Ordinance of 1896, and enacted provisions practically the same as Rule 384 of the present Ordinance, which provides for service of the garnishee summons on a defendant. Sec-

tion 371 of the Judicature Ordinance of 1893 was the section that provided for the course to be taken where the garnishee disputed liability, and the only person who under that section could apply to a Judge to fix a time and place for determining the question of the liability was the plaintiff. That section was repealed by sec. 49 of Ordinance No. 6 of 1897, and a new section substituted, which is practically the same as Rule 390 of the present Ordinance. It will be observed that under that Rule the order to fix a time and place for determining the liability may be made on the application of the plaintiff or any other person interested.

In view of these amendments, I am of opinion that the order may be made on the application of a defendant. In the first place he is a party interested, and he is required to be served with the garnishee summons. I cannot otherwise conceive what the object of the amendment could be, especially the amendment made by sec. 49 of 1897. But, while I am of that opinion, I am also of opinion that it is discretionary with a Judge to make the order on the application of the defendant. There might be circumstances in which he might consider it advisable to make the order; there might be circumstances in which he might consider it unnecessary. It will be observed that the language of the section is that the Judge may make the order. The language therefore appears to me to be permissive. Of course, in exercising his discretion a Judge must do so reasonably and on principle. If he does not, the appellate Court has power to correct his action. For instance, if the plaintiff had made the application to have the question of liability determined, the Judge could not refuse to comply unless there were some peculiar or special reasons therefor. But in this case I do not think that the Judge did exercise a discretion which was either unreasonable or against principle. As stated by the counsel on the argument in this case, the plaintiff did not apply because he did not intend to do so. The defendant could have his right of action against the garnishee by the ordinary process of the Court, and it was not necessary for him to resort to the procedure prescribed by Rule 390 of the Ordinance. The service of the garnishee summons on a garnishee, while it binds the debt, does not transfer it. That was held in Re Combined Weighing and Advertising Machine Co., 43 Ch. D. 99, and in Norton v. Yates, [1906] 1 K. B. 112. In Sykes v. Brockville and Ottawa R. W. Co., 22 U. C. R. 459, the Court held that the

serving of a garnishee summons was no bar to an action brought by the primary creditor. And, in view of the English authorities which I have just referred to, I agree with that judgment.

I think my brother Johnstone exercised a warranted discretion in the matter, and therefore this Court ought not to interfere with it. In my opinion, this appeal should be dismissed with costs.

NEWLANDS, J.:—The plaintiffs in this action issued a garnishee summons against the garnishees, and the defendant applied, under Rule 390 of the Judicature Ordinance, to my brother Johnstone to fix a time and place for summarily determining the question of their liability to him. The Judge refused to make the order asked for, and the defendant appealed to this Court.

The appeal book gives very little information. It does not shew when the garnishee summons was issued, what is the state of the proceedings between the plaintiffs and defendant, nor why this application is not made by the plaintiffs, but from the statement of counsel at the argument it appears that at the time the application was made no judgment had been entered in the original suit, and that the plaintiffs refused to proceed under Rule 390.

Under this state of facts, has the defendant the right to make such application? Where a garnishee summons is issued by a plaintiff before judgment, it is for the purpose of attaching a debt due to a defendant for the purpose of securing the plaintiff in the event of his obtaining judgment against the defendant in the suit. The proceedings are entirely for his benefit, and the defendant is in no wise interested in the proceedings, excepting in so far as his debt to the plaintiff may be discharged by such proceedings. As far as the defendant himself is concerned, his remedies against the garnishee are not affected, excepting only that he would not be allowed to recover from the garnishee the amount that would be required to discharge his own indebtedness to plaintiff. He may, however, proceed against the garnishee and obtain judgment for the amount of his indebtedness, and also, I should think, recover from him the surplus above what was necessary to satisfy the plaintiff's claim. It would be no defence to plead that the debt due him had been attached by garnishee process, unless there was payment by

the garnishee either to the plaintiff in the garnishee proceedings or into Court.

This was decided in Ontario in the Court of Queen's Bench in Sykes v. Brockville and Ottawa R. W. Co., 22 U. C. R. 459, and I adopt the reasons therefor given by Hagarty, J. On p. 464 that learned Judge says: "The law, in my opinion, gives a defence to the garnishee as against his original creditor only in the event of his paying over on an order so to do, or on execution being levied on his property. Section 297 of the Common Law Procedure Act enacts, 'Payment made by or execution levied upon the garnishee,' etc., 'shall be a valid discharge to him as against the judgment debtor to the amount paid or levied, although the proceeding should be afterwards set aside or the judgment reversed.' I have not read any English case where the point before us is expressly determined. But I gather from all the authorities, as far as they go, from the words of the Act, and from the reason of the thing, that it must be so." And on p. 465: "Apart from authority, I cannot see with what justice a debtor can urge in bar of his creditor's right to obtain judgment against him for a settled or unsettled account, that a creditor of his creditor has obtained an order to have the debt paid to him. In many cases the proceeding to judgment can alone properly settle a disputed account. It cannot but be in many cases a most inconvenient way of adjusting the true balance by action against the garnishee. If the latter pay under the order so to do, he is for ever protected; if his property be levied upon, he is to that extent also protected. In no other case can he, in my judgment, bar the original creditor's action, or suspend the right of the latter to proceed to judgment."

The defendant is not, therefore, "any other person interested," referred to in Rule 390, who may apply to have the liability of the garnishee summarily determined.

Apart from this, it seems to me that the context shews that the defendant cannot be included in these general words. The Rule says, "the plaintiff or any other person interested;" and Rule 391 says, "If the plaintiff does not proceed to have the question of liability determined," etc., the garnishee may apply to have the summons set aside. Under these general words, if any other person besides the plaintiff is intended, it can only be an assignee of the plaintiff.

In Irwell v. Eden, 18 Q. B. D. 588, similar words were restricted in their meaning. Under a Rule which provided for the "examination of such debtor or of any other per-

son," Lord Esher, M.R., said: "We have come to the conclusion that the expression 'any other person' does not include within the Rule, in the case of an individual debtor, any other person than himself, or in the case of a corporation, any one but the officers of the corporation."

In this case I am of the same opinion, that the words "any other person interested" includes only the plaintiff or an assignee of the plaintiff's claim.

It was stated by the counsel for the defendant, who also represented plaintiffs, that plaintiffs had refused to apply to have the liability of the garnishees summarily disposed of. They must, therefore, I think, be taken to have abandoned the proceedings, and the garnishees would have the right, under Rule 391, to have the garnishee summons set aside. In Wintle v. Williams, 3 H. & N. 288, where the garnishee disputed his liability, but the judgment creditor refused to issue a writ against him to determine his liability (which process under the Common Law Procedure Act was for the same purpose as is now filled by the summary proceeding provided for in Rule 390), the attaching order was rescinded, on the ground that the judgment creditor had abandoned the proceedings. Channell, B., on p. 290, says: "If a garnishee does not pay the money into Court, and does not dispute the debt, or does not appear upon the summons, the Judge may order execution to issue without any previous writ or process; but if the garnishee disputes his liability, the judgment creditor has the option of issuing a writ against him. Here, the judgment creditor declined to do so; and, therefore, I think the learned Judge was right in rescinding the attaching order. The judgment creditor in effect abandoned his right of obtaining payment from the garnishee."

I think, therefore, that the Judge was right in refusing the defendant's application to have the question of the garnishees' indebtedness summarily disposed of on the application, and that the appeal should be dismissed with costs.

SIFTON, C.J., HARVEY and STUART, JJ., agreed with the opinion of NEWLANDS, J.

SCOTT, J., concurred in the result.

NORTH-WEST PROVINCES.

(REGINA.)

APRIL 30TH, 1907.

FULL COURT.

McGILLIVRAY v. CITY OF MOOSE JAW.

Highway — Ditch Dug in Highway — Neglect to Guard — Municipal Corporation — Independent Contractors — Liability for Negligence — Misfeasance — Nonfeasance — Horses Falling into Ditch — Contributory Negligence of Drivers — Right of Owner of Horses to Recover — Bailor and Bailees.

Appeal by plaintiff from judgment of trial Judge dismissing an action for damages for the loss of property of plaintiff owing to the alleged negligence of defendants.

The appeal was heard by SIFTON, C.J., WETMORE, SCOTT, HARVEY, and STUART, JJ.

G. E. Taylor, Moose Jaw, for plaintiff.

C. E. Armstrong, Moose Jaw, for defendants.

WETMORE, J.:—This is an action for the recovery of damages alleged to have been caused to the plaintiff by the defendants, or contractors under them, in not properly guarding a ditch which they had dug in one of the defendants' streets. Messrs. Dobson, Jackson, & Fry had contracted with the defendants to construct and install a sewer in the city of Moose Jaw. The defendants had authority under their charter, Ordinances of 1903 (2) ch. 34, sec. 9, to construct such a work. At the time of the accident a main sewer had been placed in the centre of High street, one of the principal streets of the city, the earth had been filled in on top of it, and the contractors were engaged in placing service sewers from the main sewer to houses along the street. They had dug a ditch about 9 feet in depth from the main sewer, extending northerly as far as the boulevard, for the purpose of putting the service into the house of one Miller. The centre of the street was very rough, owing to the fact that

the main sewer had been placed there and the earth filled in, and persons passing along the street in vehicles were in the habit of going either to the north or south of the centre. The width of the street from the centre to the boulevard was about 24 feet. On the night in question, the plaintiff, who is a livery stable keeper, had hired out a rig and double team to 4 men named Morrison, Fleming, Oakes, and Glenn, and these men, in this rig and driving these horses, were going along High street on the north side of the centre and in an easterly direction, and the horses went into this ditch. One was killed, and the other horse, together with the waggon and harness, was injured.

It was urged on behalf of the defendants that they are not liable in any event, as the negligence, if any, was the negligence of the contractors and not theirs. I have already drawn attention to the city charter, which authorizes the construction of a work of this character by the city, and to the fact that they were causing this work to be done through contractors. In Kirk v. City of Toronto, 8 O. L. R. 730, work was being done by contractors with the city in a public and busy street, and through failure to take proper precautions to prevent accidents an accident had occurred, and it was contended that the defendants were not liable. The Court held that they were liable. Moss, C.J.O., thus lays down the law at p. 738: "The place where the work was to be done and the means by and the manner in which it was to be performed made it incumbent on the city, if it had been doing the work otherwise than through a contractor, to see that proper precautions were taken to guard against danger to the public from the use of the roller. That being so, it is clear that the city could not denude itself of this obligation by intrusting the work to a contractor. In Penny v. Wimbledon Urban District Council, [1898] 2 Q. B. 212, the rule was stated by Bruce, J., as follows: 'When a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause danger to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and that if the precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor.'"

I am of opinion that the law is thus correctly laid down, and is applicable to this case.

It was further urged that, inasmuch as the corporation were, quoad the work they were doing or causing to be done, a highway authority, they were not liable for nonfeasance. The claim, however, is not one for nonfeasance. If a municipal authority is required to do work of a certain character, say, for instance, to keep highways in repair, and does not do it, it would be nonfeasance: But if it does attempt to do it, as in this case, and in so doing does the work negligently, so that damage is caused by such negligence, it would be misfeasance. In Mayor of Shoreditch v. Bull, 20 Times L. R. at p. 255, the Lord Chancellor deals with the subject as follows: "In some cases nonfeasance might be equivalent to misfeasance; and there was here enough to shew that the conduct complained of was an alteration in the normal state of the road. That being so, if there was anything wrong in what was done—if it was negligent—it was not protected by any of the decisions."

We, therefore, arrive at the question whether there was negligence on the part of the defendants, or, which amounts to the same thing, the contractors, in the matter of this ditch. The trial Judge has found that there was no negligence on the part of the defendants, but that the persons driving the plaintiff's horses were negligent, and he therefore gave judgment for the defendants.

The question of negligence is one of fact, and an appellate Court will rarely interfere with the findings of fact of the Judge when the case is tried by a Judge without a jury. There are cases, however, in which the appellate Court will interfere, and one instance when it will do so is pointed out by Lord Halsbury in Montgomerie & Co. v. Wallace-James, [1904] A. C. at p. 75, as follows: "Doubtless, where a question of fact has been decided by a tribunal which has seen and heard the witnesses, the greatest weight ought to be attached to the finding of such a tribunal. It has had the opportunity of observing the demeanour of the witnesses and judging of their veracity and accuracy in a way that no appellate tribunal can have. But where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the Judges of an appellate Court."

I will state the facts in this case, and where there is a conflict of testimony I will take them as presented by the witnesses for the defendants. The defendants cannot com-

plain if the facts as so presented are accepted. On the night in question, the contractors and their workmen left the ditch in question with the earth thrown out of it along its course just as it was thrown out. This pile of earth on the west side of the ditch was from 2 to 4 feet high, according to some witnesses about 2 feet, according to others from 3 to 4. On the top of this sewer, pipes about 12½ feet long were placed on end and filled with dirt and banked up well to keep them steady. On the top of these pipes a plank was placed, and this extended north about 12 feet from the centre of the street, and from those to within about 2 or 3 feet from the curb, a pile of 3-inch sewer pipes about 4 feet high were placed. The earth thrown out from the ditch would naturally spread out, and the west side of it would be more or less sloping. A lantern was placed on a plank over the ditch about 3 or 4 feet from the south end of the ditch. This lantern was therefore much nearer the south end of the ditch than the north end. No lantern or other light was placed at or near the north end of the ditch. There was an electric light at the next corner of the street, but there is no evidence how far from the ditch that was, or what effect it would have in throwing light on the locus in quo. The night was dark. Matters being in this situation, Morrison and his companions came, as stated, along this street, going at the rate of about 3 or 4 miles an hour, and the horses fell into the ditch. These men were aware that sewer operations were being carried on in this street. They had passed other places where ditches had been dug and observed the lights there. Morrison, who was driving the horses, testified, in effect, that, seeing the light where it was, he was impressed with the idea that the ditch was on the south side of the street, and that he would be safe in keeping to the north of such light. This being a street much used, it was the duty of the contractors with the defendants to give warning as to these dangerous ditches which they were placing upon it, and such warning ought to have been of a character sufficient to notify a person of ordinary care of the danger. In my opinion, it was not sufficient to place a single light in the position that the light in this case was placed, nor was it sufficient to erect a barrier almost right on the edge of the ditch, so that, when the barrier effected its purpose of notifying the parties whose horses touched it or came against it of the danger, such horses were liable at the same instant to be in the ditch.

I am of opinion, therefore, that the defendants were guilty of negligence.

I am not able under the evidence to discover anything to warrant my arriving at the conclusion that the persons driving the horses were guilty of contributory negligence. The horses were going along at a moderate rate of speed. There was no contradictory evidence in this respect, and it seems to me that the fact that they had attempted to jump or had partly jumped the ditch, and had fallen back, does not warrant the conclusion that they were being recklessly driven.

The judgment of the trial Judge should be reversed and judgment entered for the plaintiff in the Court below for $193 and costs, made up as follows:

Value of the horse killed	$150 00
Horse injured, 14 days' loss of time	28 00
Damage to harness and rig	10 00
Cost of burying the dead horse	5 00
	$193 00

The amount claimed for the loss of the dead horse before it was replaced is too remote.

Defendants should pay the costs of this appeal.

SIFTON, C.J., SCOTT and HARVEY, JJ., concurred.

STUART, J.:—I agree that the judgment in this case should be reversed, although I arrive at the result on different grounds. I concur entirely in the judgment of my brother Wetmore in so far as the question of negligence on the part of the municipality is concerned, but I have been unable to bring my mind to the conclusion that the drivers of the team were not themselves also guilty of negligence. They knew perfectly well that cross-drains were being constructed at different points in the street, having already, before reaching the point where the accident occurred, passed and noticed 2 of them. I can see nothing which would justify them in assuming that the third one was also on the south side of the street. Such drains were just as likely to be on one side of the street as the other. The fact that the one lamp was placed slightly to the south of the end of the drain was not sufficient, in my view, to justify them in making that assumption. Indeed, having once observed the light, I do not think they were

justified in making any assumption on the point at all. A reasonably careful driver would, I think, have gone slowly enough to satisfy himself finally as to the exact position of the danger indicated by the light, even if he had to stop his horses altogether in order to do so. The evidence satisfies me that the men in the rig were not acting as carefully as they should have acted in the circumstances, and that their carelessness contributed to the accident which happened.

This conclusion has made it necessary for me to consider a further point, which the other members of the Court have not, in the view they take of the case, found it necessary to consider, viz., whether or not, even if the drivers were negligent, this negligence can be imputed to the plaintiff so as to deprive him of his right to recover. I have come to the conclusion that their negligence cannot be imputed to him, but, as this is only my own personal view, I content myself with stating very shortly my reasons for so holding. A careful examination of the judgment of the House of Lords in Mills v. Armstrong, 13 App. Cas. 1, and of the principles laid down therein by Lord Herschell and Lord Watson, convinces me that the liability of one person for the negligence of another and the liability of the first person to be charged with the contributory negligence of that other are, where the same relationship exists, reciprocal and co-extensive. In reviewing and overruling the older case of Thorogood v. Bryan, 8 C. B. 115, in which a passenger in a cab had been held disentitled to recover damages against the owner of another cab whose driver had been negligent and had caused him injury because the driver of the cab in which he the passenger was driving was himself negligent, the House of Lords in Mills v. Armstrong clearly apply the test of inquiring whether the passenger would have been liable to an innocent third party for the negligence of the driver, who was not his servant, and was not under his control. Having decided that he clearly would not be, they declare that the negligence of the driver could, therefore, not be imputed to the passenger as contributory negligence so as to disentitle the latter to recover. It seems to me the position here is exactly the same. It will be admitted that the plaintiff could not have been held liable for the negligence of the drivers, if they had by such negligence caused an injury to a third party, inasmuch as the relationship was that of bailor and bailee, and there was no control on the part of the plaintiff over

the drivers. If authority is needed for this it will be found in the cases of Venables v. Smith, 2 Q. B. D. 279; King v. London Improved Cab Co., 23 Q. B. D. 281; Keen v. Henry, [1894] 1 Q. B. 292; Smith v. Bailey, [1891] 2 Q. B. 403.

This being so, according to the principle stated, I cannot see that the negligence of the drivers can be imputed to the plaintiff. There is no injustice in this, because I cannot see why a livery stable keeper, whose ordinary business it is to let horses and rigs out for hire, should be required to satisfy himself first in each case as to whether the hirer is a person who is likely to be negligent or not. It is not like the case of engaging a servant to be kept in employ for some time. The test generally applied is whether there is control or not. Plaintiff had no control whatever over the drivers, once they had left the stable. The case might have been different if there had been any satisfactory evidence that the drivers were intoxicated, and this to the knowledge of the plaintiff when the hiring was done, but there is no sufficient evidence of either fact.

Judgment should therefore be entered for the plaintiff. for the amount stated in the judgment of my brother Wetmore.

NORTH-WEST PROVINCES.

(REGINA.)

APRIL 30TH, 1907.

FULL COURT.

RE OSMENT AND TOWN OF INDIAN HEAD.

Assessment and Taxes—Exemption from Municipal Rates—School Taxes.

Appeal by the town corporation from the judgment of NEWLANDS, J., upon a stated case, finding that a certain building in the town was exempt from school taxes.

F. W. G. Haultain, K.C., for the appellants.

A. L. Gordon, Regina, for the respondent.

The judgment of the Court, SIFTON, C.J., SCOTT, PRENDERGAST, HARVEY, STUART, and JOHNSTONE, JJ.) was delivered by

HARVEY, J.:—A by-law was passed by the municipality of the town of Indian Head whereby a certain building, the property of Osment, was declared exempt "from general municipal taxation and from payment of said taxes" for a period of 10 years from 1st January, 1904. This building was assessed by the municipality for school purposes only for the year 1906. The matter came before my brother Newlands by way of a stated case on appeal from the Court of Revision to determine the liability of the building for this assessment. It appears by the stated case that the Indian Head school district embraces the town of Indian Head and other adjoining lands.

My brother Newlands, considering that Canadian Pacific R. W. Co. v. City of Winnipeg, 30 S. C. R. 558, governed this case, decided that the exemption covered school taxes; and from that judgment the council now appeal.

It was objected by the respondent that an appeal does not lie, because paragraph 1 of sec. 138 of the Municipal Ordinance refers to "the person appealing"—the word "person" it is contended not covering the council. It seems to have been overlooked, however that the expression "the person appealing" is used with reference to an appeal to a Judge, not to an appeal from him, and paragraph 12 of the same section, which provides that "the decision and judgment of the Judge shall be final and conclusive in every case adjudicated upon, and can only be appealed from by a unanimous vote of the council," is quite wide enough to include an appeal by the council, a unanimous vote having been passed, as was done in this case.

I am of opinion that the case before us is distinguishable from the Winnipeg case, the terms of the exemption being quite different. The terms used in the by-law in that case were "free and exempt from all municipal taxes, rates, and levies, and assessments of every nature and kind." The expression before us is not of the same comprehensive character, and it is an expression which is used in the Municipal Ordinance in different places, and, where so used, excludes school taxes.

In sec. 139 we find the words "general, school, special, and debenture rates;" in sec. 143 "improvement tax, general

fund, local fund, and school rates;" and in sec. 144 "general fund, debenture fund, school fund, statute labour fund."

The council, when passing the by-law, must be deemed to have had a knowledge of the provisions of the Ordinance, and when they used the terms "general taxation" and "said" (meaning general) "taxes," it is reasonable to conclude that they used them with the meaning which the Municipal Ordinance gives to them, and that with that meaning they did not include school taxation and school taxes, and that it was not the intention to exempt the building from the burden of school taxes.

The definition of "municipal taxes" given in the Winnipeg case at p. 564 is as follows: "The widest definition I could give to the expression 'municipal taxes,' would be that they are taxes imposed by the governing body of a municipality for the purposes of the municipality." Under this definition the school taxes here would not be municipal taxes, for they are not imposed for the purposes of the municipality, but for the purposes of the school district, which in territorial extent and composition is quite different and distinct from the municipality.

In the Winnipeg case the legislature had ratified the by-law, so that there was no question of the power of the municipality to exempt, in so far as the province could give that power. The present case differs in that respect also, and, in my opinion, this difference is important.

As stated above, the school district comprises lands outside the municipality. By sub-sec. 2 of sec 89 of the School Assessment Ordinance, the area outside the municipality is deemed, for the purpose of raising the school taxes, to be a part of the municipality, and by sub-sec. 1 of that section, and sec. 167 of the Municipal Ordinance, the municipality is required to raise the school taxes not from property liable to assessment for municipal purposes, but from the property liable to assessment in such district for ordinary school purposes.

If the municipality were allowed to exempt property from taxation for school purposes, then the property outside the municipality, but within the school district, would require to pay a greater proportion of the school taxes, and if the municipality could exempt from school taxes, with other taxes, it appears to me that it could exempt from school taxes alone, and thereby, if it saw fit, throw the whole burden of the school taxes on the property of the district outside the

municipality, the owners of which property, of course, have no voice in the creation of the exemption.

In the absence of express legislative authority, which it it not suggested exists here, I am clearly of opinion that no such power exists in the municipality. Numerous difficulties present themselves also by reason of the actual or possible existence of public and separate school districts together, within or partly within the municipality, but I do not consider it necessary for me to go into them in view of my conclusion on the other point.

For the reasons mentioned, I am of opinion that the exemption of the by-law does not exempt from the liability to assessment for school purposes; and the appeal should be allowed with costs and the judgment of my brother Newlands reversed, and the assessment confirmed.

NORTH-WEST PROVINCES.

(REGINA.)

APRIL 30TH, 1907.

FULL COURT.

MOUSSEAU v. TONE.

Master and Servant—Wages—Contract of Hiring—Limited Term at Monthly Wages—Servant Leaving before End of Term—Right to Recover Wages Earned—New Trial.

Appeal by plaintiff from judgment of NEWLANDS, J., dismissing the action, which was brought to recover wages for work done as a farm labourer from 17th April to 24th October, 1905.

W. B. Willoughby, Moose Jaw, for plaintiff.

G. E. Taylor, Moose Jaw, for defendant.

The judgment of the Court (SIFTON, C.J., WETMORE, SCOTT, HARVEY, STUART, and JOHNSTONE, JJ.), was delivered by

WETMORE, J.:—The bargain, as stated by the plaintiff, was as follows. The defendant asked him what he wanted a

month, and he said $25 a month for either 7 or 8 months. The defendant said: "All right, you come along in the course of a week or two and I will give you $25 a month for 8 months." And on his cross-examination, plaintiff said he was hired for $25 a month for the full term of 8 months. He began to work on 17th April, and left defendant's employ on 24th October, therefore only working a little over six months.

The trial Judge held that plaintiff wrongfully quitted defendant's service before his term of hiring had expired, and that he was not entitled to any wages. Nothing was paid plaintiff on account of his wages, except some goods and cash, amounting in all to $17.40. The trial Judge held that, having left before the end of his term, he was not entitled to recover any wages.

The payment of wages in this case was to be made monthly. The bargain was to give him $25 a month for 8 months. I held in Taylor v. Kinsey, 4 Terr. L. R. 178, that under a similar contract the employee had a right to receive his wages at the end of each month, and that an action then accrued to him therefor. I am of opinion that that case was correctly decided, and the cases referred to by the trial Judge in his judgment do not seem to me to hold the contrary. In Spain v. Arnott, 2 Stark. 256, the hiring was for a year, and nothing was said as to when the wages were to be paid. In Turner v. Robinson, 5 B. & Ad. 789, the agreement was that the employee was to have wages at the rate of £80 a year. That clearly established a hiring for a year. In Lilly v. Elwin, 11 Q. B. 742, there was a general hiring as an agricultural labourer, and the judgment of Coleridge, J., at p. 754, states that that in law was a hiring for a year. In none of these cases was there any reservation of wages payable before the expiration of the term. In Davis v. Marshall, 4 L. T. N. S. 216, the hiring was for a year, and the employee's wages were made payable monthly. He was wrongfully dismissed, and brought an action for wrongful dismissal. The Court held that, notwithstanding the fact that the wages were payable monthly, the damages were not confined to only a month's wages. That does not touch the question involved in this case, it seems to me. I do not dispute the fact that in this case the hiring was for 8 months, and that is what was held in Rex v. Birdbrook, 4 T. R. 245. The question involved in this case was not touched upon in that case. If in this case the hiring had been merely for 8 months without

any statement as to when the wages were to be paid, they would not be payable until the expiration of the term of hiring, and in that case if the employee had left wrongfully before the end of the term he would not be entitled to recover any wages, but, inasmuch as in this case the hiring was for 8 months at $25 a month, the plaintiff is entitled to recover at the end of each month, and the only remedy the employer would have would be a counterclaim or cross-action for damages for the servant's wrongful leaving.

The judgment was given in this case without hearing evidence for the defence. Under such circumstances, I am of opinion that there should be a new trial. I think the judgment of the trial Judge should be set aside with costs of this appeal to plaintiff, and a new trial granted. Costs of the first trial to abide the event.

NORTH-WEST PROVINCES.

(REGINA.)

APRIL 30TH, 1907.

FULL COURT.

ADOLPH v. HILTON.

Attachment of Debts—Proof of Debt Due by Garnishee to Judgment Debtor—Burden of Proof—Goods Sold to Garnishee—Debt Due for Price—Condition—Title of Judgment Debtor to Goods.

Appeal by William Stephens, garnishee, from the judgment of WETMORE, J., under Rule 390 of the Judicature Act, determining against the garnishee the question of his liability, to William Hilton, the judgment debtor, upon a garnishing application made by Adolph and McKay, the judgment creditors.

The appeal was heard by SIFTON, C.J., SCOTT, PRENDERGAST, HARVEY, STUART, and JOHNSTONE, JJ.

J. T. Brown, Moosomin, for the garnishee.

E. L. Elwood, Moosomin, for the judgment creditors.

SCOTT, J.:—This is an appeal by the garnishee from the judgment of Wetmore, J., under Rule 390 of the Judicature Ordinance, determining the question of the garnishee's liability.

The only evidence adduced at the hearing was that of the garnishee, who admitted that he had purchased a team, waggon, and harness from the judgment debtor for $500, payable $350 in money and the delivery to the latter of a mare and colt valued at $175. He asserted, however, that the purchase by him was subject to the condition that he was not to settle for the team until he was satisfied that they were paid for, but, upon cross-examination by his own counsel, when asked to state the exact words used by him at the time the agreement was made, his reply was such as would, in my opinion, reasonably lead to the conclusion arrived at by the Judge, that no such condition was attached to the agreement.

The garnishee obtained possession of the team, waggon, and harness immediately after the agreement was made, and he retained and used them until after the service of the garnishee summons upon him, more than 2 months afterwards. Shortly after the making of the agreement, the judgment debtor obtained possession of the mare and colt. The garnishee contended that the taking possession by him of the team at that time was merely for the purposes of trial, and that he delivered the mare and colt to the judgment debtor merely by way of loan, but the circumstances attending these changes of possession, as related by the garnishee, were such as would reasonably justify the Judge in holding, as he did hold, that these changes of possession were not for those purposes, but that they were delivering of possession in pursuance of the agreement.

After obtaining possession of the team, waggon, and harness, and before the service of the garnishee summons, the garnishee caused inquiries to be made as to whether they had been paid for, and as to the existence of any liens upon them, and having been informed that they had not been paid for, he spoke to Hilton about it, telling him that there was $450 due on the team, and requested him to give his note therefor. Hilton came to him shortly afterwards and informed him that one Duxbury was going to settle for "those things" by 1st January.

There is nothing in the evidence to shew that any one had any valid claim of lien upon the articles, for purchase money or otherwise, or even that any lien was claimed by any person.

Even assuming that the agreement was subject to the condition that the garnishee was to be satisfied that the articles were paid for before he should be called upon to pay for them, I doubt whether, under it, Hilton would be required to produce proof of that fact before he would be entitled to sue the garnishee. It appears to me that the only effect of such a condition would be that the latter would be entitled to a reasonable time in which to make such inquiries and ascertain whether any liens existed against the property.

But, as the Judge has found, and I think properly found, that no such condition was attached to the agreement, the question arises as to the onus of proof in such a proceeding as this as to the existence or non-existence of any liens upon the property.

I am of opinion that if there existed any such lien or claim, the amount of which the garnishee was entitled to deduct from the purchase money, the onus was on him to prove the fact. It would be incumbent upon him to do so in an action by the judgment debtor against him for the price, and I see no reason why the burthen of proof should be shifted in such a proceeding as this.

In my opinion, the appeal should be dismissed with costs.

PRENDERGAST, HARVEY, and JOHNSTONE, JJ., concurred.

STUART, J.:—This is an appeal from the judgment of Mr. Justice Wetmore rendered upon an application to determine summarily the liability of the garnishee to the defendant. The Judge gave judgment for the plaintiffs, declaring that at the date of the service of the garnishee summons the garnishee was indebted to the defendant in the sum of $325.

I am of the opinion, with great respect, that the appeal should be allowed and the judgment reversed. The garnishee, Stephens, was the only witness examined, and the account given by him of the transaction was to the effect that he had agreed conditionally with the defendant to purchase the defendant's team and outfit for $500, the condition being that he, Stephens, must be satisfied that they were paid for by Hilton before the agreement should have effect at all. The trial Judge disbelieved that part of the garnishee's evidence

in regard to the condition, holding that the sale was an absolute one. I should hesitate much before venturing to disturb this finding of the trial Judge, but I am of opinion that the case can be disposed of on other grounds without taking that course.

The Sale of Goods Ordinance, sec. 14, enacts as follows: "In a contract of sale, unless the circumstances of the contract are such as to shew a different intention, there is (1) an implied condition on the part of the seller that in the case of a sale he has the right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass."

Whether the garnishee's story as to the express condition is true or not, this provision applies to the sale in question, and the sale from Hilton to Stephens was, therefore, subject to the implied condition that the former had the right to sell, there being admittedly no circumstances shewing a different intention. To my mind, there cannot be the slightest doubt that if Hilton had, at the date of the garnishee summons, sued Stephens for the price of the goods, and Stephens had told to his advocate the story which he told at the trial, he would, if properly advised, have put a plea on the record that the goods were not Hilton's and he had no right to sell them. There were no pleadings in this case, and, even if a formal issue had been directed, it would have taken merely the form of an assertion by the plaintiffs and a denial by the garnishee that at the date of the service of the summons there was a debt due or accruing due from the garnishee to the defendant. Under this issue I think the garnishee would have been entitled to raise any defence which he might have raised against Hilton, and he was entitled to do the same at the summary trial upon which the judgment under appeal was given. Whether the garnishee proved the lack of title in Hilton or not, he certainly raised the question quite definitely in the evidence which he gave. He swore that he had received an offer from some stranger to sell the horses to him, and had even received a note to be signed. Whether that was true or not, it was sufficient, I think, as an informal plea. The plaintiffs can stand in no better position than Hilton would have stood, and I am therefore of opinion that the question must be dealt with exactly in the same manner as it would have been dealt with if Hilton had sued Stephens, and Stephens had pleaded that Hilton had no right to sell. What would have been the position of the parties

in that case? Upon whom would the burden of proof have lain? It may be that the burden of proving his title would not, in the first instance, have rested upon Hilton. I would have doubted even on that point if there had been no delivery of the goods. But what is the position in this case? It is true Stephens took possession of the property, and, as the Judge found, delivered a mare and colt in part payment therefor. But, supposing Hilton had sued for the balance of the price and Stephens had said: "True, I agreed to buy your goods; true, I have possession of them. But I still have them and I can return them as they were. You come into Court and admit you have not paid for them. You admit there is $83 still to pay." (I am taking here the trial Judge's version of the evidence, although I am inclined to think the $83 referred to was stated by Hilton to be due not on the horses but on the present plaintiffs' debt.) "You say again that some man in Elkhorn has promised to settle for them by 1st January. More than this, I have had a man offer to sell them to me myself and he has sent me a note to sign for them. All this has caused me to doubt very much whether you ever had a right to sell the goods to me at all. I want to be sure the goods are mine before I pay for them." If Stephens had said this in Court when sued by Hilton, what course would the Court have taken? It will be observed that the trial Judge has not found that the statements made by Stephens at the trial and which I have just repeated were untrue. He has practically accepted them, but he held that they do not go far enough. No doubt, they do not go far enough to establish conclusively the proposition that Hilton had no right to sell the horses and waggon. But I am of opinion that, if it had been an action at the suit of Hilton against Stephens, and this evidence had come out, the Court would have hesitated a good while before giving judgment for Hilton without requiring at least a simple oath from him that the goods were his and he had a right to sell them. In others words, even if the burden of proving title would not have been upon him in the first instance, I think Stephens would, in the case supposed, have brought out sufficient and cast enough doubt upon his title to shift the burden of proof upon Hilton. It is true Stephens had taken the goods, but, as the evidence shews, he was still in a position to return them, and actually did so. Even if he had kept them when sued by Hilton, it seems to me he was entitled to say: "I am ready to carry out my bargain, but I have given you grave reason why I doubt your title. You must now at least sat-

isfy me that the goods were yours." It is a well known rule of evidence that where a fact is peculiarly within the knowledge of one party the burden of proving it lies upon him. Hilton's title was peculiarly within his own knowledge, and I think, in the exercise of a sound discretion, the Court would, in the supposed case, have thrown the burden upon him of proving it. That would be the time to settle the matter once for all, instead of giving judgment for Hilton, and leaving Stephens to bring an action for damages in case it should turn out afterwards that the title was defective, of which there was certainly a very grave suspicion. The plaintiffs, as I have said, must stand in the place of Hilton. What Hilton would be bound to prove, they were bound to prove. It was urged that Hilton was away and they could not call him; but that is true also of Stephens, if the burden of proof is thrown on him.

To give judgment for the plaintiffs against Stephens seems to me in this case to be doing nothing less than giving judgment for Hilton against Stephens by accepting Stephens's evidence in so far as it is against him and rejecting what is in his own favour, and by depriving him of the opportunity either to cross-examine Hilton at trial or to examine him for discovery, both of which means of proof would have been open to him if Hilton had sued him. In this respect the plaintiffs are being placed in a far more favourable position than Hilton would have been in, and this is an additional reason, to my mind, why the burden of proof should not have been placed upon Stephens, inasmuch as his best means of proof are not available to him.

I think, therefore, that this Court is at liberty, without at all interfering with the trial Judge's findings as to the terms of the contract, to say that before Stephens should be made to pay for the goods it was incumbent on the plaintiffs to shew that he had received a good title. The trial Judge apparently assumed that the burden was upon Stephens, but in that, with great deference, I cannot but think he was, in the circumstances, mistaken. There being no evidence whatever to shew title in Hilton, I am of opinion that the appeal should be allowed and the order varied so as to declare that at the date of the service of the summons there was no debt due or accruing due from the garnishee to the defendant.

SIFTON, C.J., concurred.

Appeal dismissed; SIFTON, C.J., and STUART, J., dissenting.

NORTH-WEST PROVINCES.

(REGINA.)

APRIL 30TH, 1907.

FULL COURT.

STEINE v. O'NEIL.

Sale of Goods — Action for Price—Defence—Accord and Satisfaction—Novation.

Appeal by defendant from judgment of trial Judge in favour of plaintiff in an action for the price of goods sold.

W. B. Willoughby, Moose Jaw, for defendant.

G. E. Taylor, Moose Jaw, for plaintiff.

The judgment of the Court (SIFTON, C.J., SCOTT, PRENDERGAST, NEWLANDS, HARVEY and STUART, JJ.), was delivered by

NEWLANDS, J.:—This is an action for the price of 12 coats alleged to be sold by plaintiff to defendant. The defence is that defendant purchased the goods from plaintiff as the representative of Freidman Bros., of Montreal; that the goods not arriving in time, defendant wrote to Freidmans, and other goods were shipped to him; that plaintiff then shipped the goods to defendant, who refused to accept the same, and plaintiff then agreed with him that he should hold the goods to plaintiff's order and sell the same for him. Plaintiff denies this, and swears to a sale of the goods from himself to defendant. The trial Judge found against defendant on the first portion of the defence, and gave judgment for plaintiff. Without questioning his finding, it appears to me that he failed to give due consideration to the second portion of the defence, setting up an accord and satisfaction. Defendant wrote plaintiff stating that he would not accept the goods, and plaintiff thereupon credited defendant with the goods, stating that the goods were held to his (plaintiff's) order. He also credited defendant with the freight he had paid on them, and he wrote defendant, "We trust you will succeed in disposing of all or even a part of the coats." There was

thus a new contract made between the parties, which cancelled the previous contract for the purchase of the goods by defendant. Defendant is therefore not liable for the price of the goods sued for, as he has not sold other than 2 coats, the price of which he has paid into Court. The appeal should, therefore, be allowed with costs, and the judgment in the Court below in favour of the plaintiff set aside, and judgment entered for defendant with costs.

NORTH-WEST PROVINCES.

(REGINA.)

APRIL 30TH, 1907.

FULL COURT.

REX v. CANADIAN PACIFIC R. W. CO.

Constitutional Law—Prairie Fires Ordinance—Intra Vires—Application to Dominion Railways — Conflict with Dominion Legislation — Conditions of Ordinance—Magistrates' Convictions — Evidence before Magistrates—Consideration by Court on Certiorari—Jurisdiction to Review —Negligence.

Motion by the defendants to make absolute two rules nisi for writs of certiorari for the purpose of quashing convictions made against them for breach of the Prairie Fires Ordinance.

The motion was heard by SIFTON, C.J., WETMORE, PRENDERGAST, NEWLANDS, HARVEY, and STUART, JJ.

H. A. Robson, Winnipeg, for defendants.

Frank Ford, Regina, for the Crown.

HARVEY, J.:—The section under which the convictions are made, as amended by the addition of sub-sec. (2) in the first session of 1903, and of sub-sec. (3) in the second session of the same year, is as follows:—

"(2) Any person who shall either directly or indirectly, personally or through any servant, employee or agent—

"(a) Kindle a fire and let it run at large on any land not his own property . . . shall be guilty of an offence and shall on summary conviction thereof be liable to a penalty of not less than $25 and not more than $200, and in addition to such penalty shall be liable to civil action for damages at the suit of any person whose property has been injured or destroyed by any such fire.

"2. If a fire shall be caused by the escape of sparks or any other matter from any engine or other thing, it shall be deemed to have been kindled by the person in charge or who should be in charge of such engine or other thing, but such person or his employer shall not be liable to the penalties imposed by this section if, in the case of stationary engines, the precautions required by section 12 have been complied with, and there has been no negligence in any other respect, or, in the case of railway or other locomotive engines, such engine is equipped with a suitable smoke stack netting and ash pan netting in good repair and kept closed and in proper place, and in the case of railway engines where the line of railway passes through prairie country there is maintained for a distance of at least 3 miles continuously in each direction from the point at which the fire starts on each side of such line of railway and not less than 200 nor more than 400 feet therefrom a good and sufficient fireguard of ploughed land not less than 16 feet in width, kept free from weeds and other inflammable matter, and the space between such fireguard and such line of railway is kept burned or otherwise freed from the danger of spreading fire, and there has been no negligence in any other respect."

"(3) For the purpose of ploughing any fireguard, as in the next preceding sub-section provided, and of freeing from inflammable matter the land between such fireguard and the line of railway, any railway company is hereby authorized to enter upon any uncultivated or unoccupied land, without incurring any liability therefor, provided that no unnecessary damage shall be done."

Several grounds were taken in the rule, but the only ones which were urged or argued on this motion are as follows:—

"5. That penalties imposed by a provincial legislature for the kindling of fire and letting it run at large do not apply to railway companies governed by the Dominion Railway Act in the operation of locomotive steam engines upon their railways."

"6. That the provisions contained in sub-sec. (2) of sec. 2 of the Prairie Fires Ordinance, as amended, whereby the penalties provided by the section are not to be imposed 'if in the case of railway or other locomotive engines such engine is equipped with a suitable smoke stack netting and ash pan netting in good repair and kept closed and in proper place, and in the case of railway engines where the line of railway passes through prairie country there is maintained for a distance of at least 3 miles continuously in each direction from the point at which the fire starts on each side of such line of railway and not less than 200 nor more than 400 feet therefrom a good and sufficient fireguard of ploughed land not less than 16 feet in width, kept free from weeds and inflammable matter, and the space between such fireguard and such line of railway is kept burned or otherwise freed from the danger of spreading fire,' are in effect requirements of the legislature of the North-West Territories or the province of Saskatchewan that such recited precautions be observed under penalty for the want of such observance; that the accused company are a railway company formed, existing, and operating under the laws of the Dominion of Canada, and as to such railway companies the provisions of said sub-sec (2) requiring such precautions have been superseded by and are in conflict with the provisions of the Railway Act, 1903, and particularly sec. 25 thereof, whereby the Board of Railway Commissioners for Canada may make orders and regulations 'with respect to the use on any engine of nettings, screens, grates, and other devices, and the use on any engine or car of any appliances and precautions, and generally, in connection with the railway, respecting the construction, use, and maintenance of any fireguard or works which may be deemed by the Board necessary and most suitable to prevent, as far as possible, fires from being started, or occurring, upon, along, or near the right of way of the railway.' "

"7. That the provisions of the amended sec. 2 regarding fireguards are ultra vires as regards railways governed by Dominion legislation."

The first objection which is numbered "5" is met by the decision of this Court against the same defendants in Rex v. Canadian Pacific R. W. Co., 1 W. L. R. 89, in which a conviction for the same offence was in question. I may also refer to Grant v. Canadian Pacific R. W. Co., 36 N. B. R. 528, in which a somewhat similar Act of the province of New Brunswick was held to apply to the defendant company.

The next objection, however, is that those decisions are not now applicable, because the Dominion Parliament has legislated on the subject, and. even if the province or the Territories had the right to pass such legislation to affect Dominion railways at the time it was passed, it must be taken as being now overborne by the Dominion legislation.

The Dominion legislation referred to, and which is applicable to this case, is contained in paragraph (e) of sec. 25 of the Railway Act, 1903, which provides that the Board of Railway Commissioners which is constituted by that Act, may make orders and regulations:—

"(e) With respect to the use on any engine, of nettings, screens, grates, and other devices, and the use on any engine or car of any appliances and precautions, and, generally, in connection with the railway, respecting the construction, use, and maintenance of any fireguard or works which may be deemed by the Board necessary and most suitable to prevent, as far as possible, fires from being started, or occurring, upon, along, or near the right of way of the railway;" and sec. 239 of the same Act, which is in the following terms:—

"239. The company shall at all times maintain and keep its right of way free from dead or dry grass, weeds, and other unnecessary combustible matter.

"2. Whenever damage is caused to crops, lands, fences, plantations, or buildings and their contents, by a fire, started by a railway locomotive, the company making use of such locomotive, whether guilty of negligence or not, shall be liable for such damage, and may be sued for the recovery of the amount of such damage in any Court of competent jurisdiction;

"Provided that if it be shewn that the company has used modern and efficient appliances and has not otherwise been guilty of any negligence, the total amount of compensation recoverable under sub-section 2 of this section, in respect of any one or more claims for damage from a fire or fires started by the same locomotive and upon the same occasion, shall not exceed $5,000, and it shall be apportioned amongst the parties who suffered the loss as the Court or Judge may determine.

"3. The company shall have an insurable interest in all such property upon or along its route, for which it may be so held liable, and may procure insurances thereon in its own behalf."

It does not appear to me to be necessary for the purposes of this case to consider whether the first sub-section of sec. 239 supersedes any portion of the Ordinance, for it is not in any way in conflict with it, and, in the view I take, the question of the proper penalty for breach cannot arise, having reference to the evidence. It is quite clear from sec. 25 (e) that this sub-section is not intended to cover the whole field, and therefore to supersede entirely the provisions of the Ordinance on the subject. It was not strongly urged, nor do I think it can be strongly urged, that the second sub-section of sec. 239 supersedes the provisions of the Ordinance. The provisions of the Act have reference to the civil liability alone, and are for the protection of the individual injured; while the provisions of the Ordinance, as far as in question here, simply impose a penalty for the protection of the public generally.

As to sec. 25 (e), it is admitted that no rules and regulations have been made by the Board, and I am quite unable to see how it can be seriously contended that until that is done it is effective legislation by the Dominion. The point, moreover, appears to be settled by the decision in Attorney-General for Ontario v. Attorney-General for the Dominion, [1896] A. C. 348, in which it was held that, notwithstanding the provisions of the Canada Temperance Act, the provincial Act of Ontario permitting local prohibition in municipalities was valid and effective in municipalities in which the provisions of the Canada Temperance Act were not adopted, it being also a permissive Act with the same object as the Ontario Act. During the course of the argument Lord Watson, at p. 354, said: "Where the Temperance Act is not adopted, there is no law as yet applicable, and there the field is not covered." It appears clear from this authority that the provincial legislation cannot be rendered inoperative by Dominion legislation, which is in itself inoperative and incomplete.

With regard to the last ground advanced, it is urged that the evidence shews that the conditions of the Ordinance other than those relative to the fireguards existed, and that those conditions are such as the provincial legislature has no right to impose. In support of the convictions, however, it is objected that the evidence cannot be looked at to support any such conclusion. As was pointed out in Rex v. Canadian Pacific R. W. Co., 1 W. L. R. 99, under sec. 8 of the Prairie Fires Ordinance, the burden is on the defendants of estab-

lishing the existence of the conditions necessary to relieve them of the penalties imposed by the Ordinance. It is not suggested that in the present cases there is not evidence to shew the contravention of the Ordinance, and thus to justify a conviction, in the absence of proof of the conditions establishing an exemption, but it is urged that, leaving aside the question of the fireguards, there is uncontradicted evidence of the existence of all the conditions, and, that being uncontradicted, it should be believed, and the conclusion therefore arrived at that the decision of the magistrate is founded on the absence of fireguards the existence of which it is admitted is not proved.

It is in this regard, and in this regard only, that the two convictions differ. In the one where the fire started near Mortlach, admissions were made by the prosecutor "that the engine was inspected and in proper order," and "that the engine was properly operated." In the other case, where the fire started near Ernfold, there were no admissions, and I will consider it first. The authorities do not appear to be entirely clear as to whether the evidence may be looked at on certiorari, but I can find no authority that would justify the conclusion that it could be looked at and weighed as would require to be done to support the defendants' contention. This is not an appeal. There is an appeal from such a conviction to a Judge of this Court, and on such an appeal the evidence could be considered and weighed. In Rex v. Bolton, 1 Q. B. 66, a motion to quash on a return to a certiorari, Lord Denman in delivering judgment at p. 72 said: "All that we can then do, when their (the magistrates') decision is complained of, is to see that the case was one within their jurisdiction and that their proceedings on the face of them are regular and according to law;" and at p. 73: "When a charge has been well laid before a magistrate on its face bringing itself within his jurisdiction he is bound to commence the inquiry; in so doing he undoubtedly acts within his jurisdiction; but in the course of the inquiry evidence being offered for and against the charge, the proper, or it may be the irresistible, conclusion to be drawn may be that the offence has not been committed, and so that the case, in one sense, was not within the jurisdiction. Now to receive affidavits for the purpose of shewing this is clearly in effect to shew that the magistrate's decision was wrong if he affirms the charge and not to shew that he acted without jurisdiction. . . . Upon principle, therefore, affidavits cannot be re-

ceived under such circumstances. The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature; it is determinable on the commencement, not at the conclusion, of the inquiry." This case is constantly referred to in the later cases, and was approved and followed by the Privy Council in Colonial Bank of Australia v. Willan, L. R. 5 P. C. 417. In that case, at p. 443, it is stated that Rex v. Bolton is an example of the authorities which establish that "an adjudication by a Judge having jurisdiction over the subject-matter is, if no defects appear on the face of it, to be taken as conclusive of the facts stated therein; and that the Court of Queen's Bench will not on certiorari quash such an adjudication on the ground that any such fact, however essential, has been erroneously found." Likewise it has been held in our own Court in The Queen v. O'Kell, 1 Terr. L. R. 79, that the Court cannot review the magistrate's conclusion, and that "the law is clear that where the charge is one that if true is within the magistrate's jurisdiction, the finding of the facts by him is conclusive and is not open to review here." In the last mentioned case the evidence was looked at for the purpose of ascertaining whether there was evidence of the offence charged. There are other Canadian cases in which this appears to have been done, but, so far as I have been able to find, that is the utmost limit to which use may be made of the evidence, certainly in cases where there is an appeal. What is asked here, however, is that the evidence be looked at and a decision given that there is not simply evidence but proof of certain facts. It is the same as if the Court were asked on certiorari to make a conviction where a dismissal had taken place. This was done in The King v. Reason, 6 T. R. 375. In the report of this case it is stated that "the Court said that the evidence given was entirely and exclusively for the consideration of the justices below, who were placed in the situation of a jury, and, as they had acquitted the defendant, this Court could not substitute themselves in the place of the justices acting as jury-ment and convict him. That they could not judge of the credit due to the witnesses whom they did not hear examined. That they could only look to the form of the conviction and see that the party, if convicted, had been convicted by legal evidence, and that they must consider on this return that the magistrates had determined on the facts and not on the law of the case as distinguished from the facts." The last sentence is important, because in that case, as in the one

before us, it was a question of the magistrate having erred in the law. It appears to me beyond question that on these authorities it is not open to this Court to usurp the functions of the justices and find any facts proved which they do not appear to have found proved.

As to the Mortlach case it is urged that the admissions leave nothing but the question of the fireguards. Without examining the admissions carefully to determine their purport, and without considering their effect, it appears to me that, giving the defendants the fullest benefit possible from them, there is still the general question of negligence. The meaning of the exemption in sub-sec. 2 appears to be that if there has been no negligence there is no liability, certain illustrations of what will be negligence being stated. What other negligence there might be is for the justices' consideration. If they err, the court of appeal is the place to have the error corrected, not this Court, on such an application as this.

I am not prepared to say what might be other negligence. It would depend on the circumstances of the case, and would be determinable on the evidence by the justices. The evidence shews that the fire started in the defendants' right of way, in the grass which had not been burned or otherwise cleared away. Apart from the provisions of sub-sec. 1 of sec. 239 of the Railway Act, 1903, above quoted, the case of Rainville v. Grand Trunk R. W. Co., 25 A. R. 242, affirmed in appeal, 29 S. C. R. 201, shews that the presence of this grass, for one thing, might be considered as negligence, even though the provisions of the Ordinance regarding its removal were invalid. It is said that, being specially mentioned by the Ordinance, it is not other negligence. To give such a meaning would not, in my opinion, give effect to the spirit of the Ordinance, and would not be justified, the intention of the exemption being, as I have indicated, the absence of all negligence. It appears to me, therefore, that in the Mortlach case, as in the Ernfold case, it is not competent for this Court to say that the justices founded their decision on the view that the provisions of the Ordinance respecting fireguards were valid and binding, but, even if they did, in my opinion that would be no ground for quashing the convictions, for it appears to me that they are, without doubt, within the competence of the legislature to pass as applicable to Dominion railways.

That the Ordinance in question was passed by the legislature of the North-West Territories does not appear to me to be material. By virtue of the Saskatchewan Act it has become provincial law, and the power of the territorial legislature was, so far as the matter under consideration is concerned, practically identical with that of a provincial legislature.

The scheme of division of legislative power under the British North America Act has been considered by the Judicial Committee in numerous cases, and from the decisions the following general principle appears to be deducible, namely, that, in the absence of Dominion legislation on matters that are not of the essence of the subject-matters exclusively reserved to the Dominion Parliament by sec. 91, but are merely anciliary thereto, the province may legislate if the method of treatment in such legislation is to make it come properly within any of the classes of legislation reserved to the province by sec. 92. In the late Privy Council case decided last year, Grand Trunk Railway Co. v. Attorney-General for Canada, 76 L. J. P. C. 23, Lord Dunedin, who delivered the judgment, says: "A comparison of two cases decided in the year 1894, namely, Attorney-General for Ontario v. Attorney-General for Canada, [1894] A. C. 189, and Tennant v. Union Bank of Canada, [1894] A. C. 31, seems to establish these two propositions: first, that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires, if the field is clear; and secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail." In the former of the two cases mentioned, the provincial Assignments Act was held intra vires, and, referring to it in Huson v. Township of South Norwich, 24 S. C. R. 145, at p. 155, Taschereau, J., says: "It results from that case, if I do not misunderstand it, that there are under the British North America Act, subjects that may be dealt with by both legislative powers, and that the provincial field is not to be deemed limited by the possible range of unexercised power by the Dominion Parliament, so that a power conferred upon the latter, but not acted upon, may, in certain cases, be exercised by the provincial legislatures, if it fall within any of the classes of subjects enumerated in sec. 92." The validity of the Ordinance under consideration is not questioned otherwise than in its application to Dominion railways, and therefore it is con-

ceded that it falls within one or more of the classes of subjects enumerated in sec. 92, and the only question then to consider is, whether it deals with matters essential or only anciliary to Dominion railway legislation; as I have pointed out before, there is no effective Dominion legislation with which it can be said to be in conflict. The fact that ever since Confederation there has been legislation by the Dominion covering the field of Dominion railways, without any provisions upon the subject of the provisions of the Ordinance, appears to me a very strong argument in favour of the view that it cannot be deemed to be essential to such railway legislation, and that therefore it is intra vires so long as the field is clear.

The defendants rely very strongly on the case of Madden v. Nelson and Fort Sheppard R. W. Co., [1899] A. C. 626, in which it was decided that an Act of the province of British Columbia, which declared that railway companies within the authority of the Parliament of Canada which did not fence their right of way should be liable for damage for cattle killed or injured by their trains, was ultra vires. It does not appear to me that that case governs the present one at all. It is not denied that if the Dominion had, as part of its railway legislation, made provisions for protection from prairie fires in confiict with the provisions of the Ordinance, or covering the field, the provisions would thereupon cease to be applicable to Dominion railway. In the Madden case, at the time the Act thereby declared ultra vires was passed, there was, as part of the Dominion Railway Act of 1888, provision for the erection of fences and other safeguards for the protection of animals, and for the liability for failure to comply with such provisions. What the province attempted to do, and what in the preamble to the Act it shewed it intended to do, was to impose a further obligation and liability on the same subject. This it clearly had no right to do, the obligation and liability having been fixed by the Dominion legislation, and the field of legislation having been thereby occupied. As it is stated in the judgment at p. 628: "It would have been impossible, as it appears to their lordships, to maintain the authority of the Dominion Parliament if the provincial Parlaiment were to be permitted to enter into such a field of legislation, which is wholly withdrawn from them, and is therefore manifestly ultra vires." The case of Canadian Pacific R. W. Co. v. Notre Dame de Bonsecours, decided a couple of months earlier, [1899] A. C.

367, seems to me to be much more applicable. It is perfectly clear from that and many other cases that it is no objection to the validity of a provincial law that it imposes burdens on railway or other corporations which are subject only to the Dominion. At p. 372, in the judgment of Lord Watson, it is stated: "The British North America Act, whilst it gives the legislative control of the appellants' railway, qua railway, to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the provinces in which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the provincial legislatures. Accordingly, the Parliament of Canada had, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company; but it is, inter alia, reserved to the provincial parliament to impose direct taxation upon those portions of it which are within the provinces, in order to the raising of a revenue for provincial purposes. It was obviously in the contemplation of the Act of 1867 that the 'railway legislation,' strictly so called, applicable to those lines which were placed under its charge, should belong to the Dominion Parliament. It, therefore, appears to their lordships that any attempt by the legislature of Quebec to regulate by enactment, whether described as municipal or not, the structure of a ditch forming part of the appellant company's authorized works, would be legislation in excess of its powers. If, on the other hand, the enactment had no reference to the structure of the ditch, but provided that, in the event of its becoming choked with silt or rubbish, so as to cause overflow and injury to other property in the parish, it should be thoroughly cleaned out by the appellant company, then the enactment would, in their lordships' opinion, be a piece of municipal legislation competent to the legislature of Quebec."

Now, it appears to me that in the case before us, all that is required is the removal of the combustible matter on the surface for the same purpose as was in view in that case, namely, to prevent injury to other property, and that it does not in any way attempt to interfere with the structure of the authorized works of the railway. The primary purpose of the ploughing is to permit the space between to be burned without danger to property beyond. If the provisions are all complied with, there will be a space of a cer-

tain width, through which the track runs, deemed to be wide enough to catch all sparks emitted from the engines which will be entirely free from any matter of a combustible nature, and thereby the danger of such sparks starting a fire will be removed.

I cannot see how it can be said that the ploughing interferes with the works of the railway. It does not in any way affect the track or the right of way or other property of the company, and so is quite different from a fence on or bounding the right of way. It does not in any way interfere with the management of the company's business as a railway. It simply is something which the company may do on other people's property on which it is authorized to go for that purpose, and is entirely independent of its business as a railway company.

I am of opinion, therefore, that until the Dominion Parliament occupies the field, the Ordinance in question applies to Dominion railways.

As in my view none of the defendants' grounds can be sustained, the rules should be discharged.

SIFTON, C.J., PRENDERGAST, NEWLANDS, and STUART, JJ., concurred.

WETMORE, J.:—I agree with the conclusion arrived at by my brother Harvey in the Ernfold case. Sub-section (2) of *sec. 2* of the Prairie Fires Ordinance, ch. 87 of the Consolidated Ordinances, as amended by ch. 25 of the first session of 1903, cast the burden of proving that the engine and apparatus were in proper repair and properly operated, upon the company. If the company failed to satisfy the justice of that fact, it was his duty to impose a penalty. We are unable to assume in this case that the company did establish to the satisfaction of the justice that the engine and apparatus were in good repair and properly operated. I am of opinion that the authorities fully bear out the proposition that where the question is one entirely of fact, this Court cannot by certiorari quash the conviction; at any rate unless there is a total absence of any evidence to warrant a conviction.

This Court held in Rex v. Canadian Pacific R. W. Co., 1 W. L. R. 89, that the Ordinance was intra vires in requiring that the company's engines should be equipped in the manner prescribed and the netting kept closed and in the proper

place. That is the law as we understood it at the time that decision was given, and, in my opinion, it is the law yet. I can find no legislation either in the Dominion Railway Act, or in any regulation made under its provisions, which lays down a different law, and until some legislation or duly authorized regulation is made by some proper authority, that law, as interpreted by the case cited, still remains in force. I am, therefore, of opinion that the rule in this case should be discharged.

As to the Mortlach case, however, I regret that I cannot agree with my brother Harvey. In Rex v. Canadian Pacific R. W. Co., before cited, at p. 93, I expressed a doubt whether the duty cast upon the company to make fireguards was within the power of the local legislature, and I have come to the conclusion that these doubts were well founded. Sub-section (2), before referred to, of the Ordinance in question, has, to my mind, two provisions so far as railways are concerned. First there is the provision where fire is caused by the escape of sparks or igneous matters from an engine, and such engine is not equipped with suitable smoke stack and appliances in good repair, and kept closed and in proper place; second, in cases where the line of railway passes through prairie country, a good and sufficient fireguard is not made and kept free from weeds and other inflammable matter, and the space between the fireguard and line of railway kept burned or otherwise freed from the danger of spreading fire, and there is no negligence in any other respect.

In this case it was admitted on behalf of the prosecution that the engine was inspected and in proper order, and that it was properly operated. I take the fair meaning of that to be that the prosecution did not purpose to base their case upon the engine not being properly equipped, or upon its being improperly operated in so far as the provisions in the sub-section in question were concerned. They practically abandoned any case in so far as those questions were concerned. I take that to be a reasonable construction to put upon the admission referred to. This brings us to the question of the fireguard. To my mind, it just narrows itself down to this: Had the local legislature power to compel the company to plough a fireguard practically the whole length of its distance through prairie country, or take the consequences of being liable to a penalty if it did not do so, and a fire occurred from sparks from one of their engines.

The burning of weeds between the fireguard and the line of railway and keeping it freed from weeds and other inflammable matter is merely an incidental matter. Everybody who is acquainted with this country, knows that in the fall of the year the prairie grass is very inflammable, and that any attempt to burn off the grass on the railway right of way without first ploughing a fireguard would almost inevitably result in the fire running at large over the whole country. The fireguard provided for by the Ordinance in the nature of things intended to prevent the fire which was to be lit either to burn off the grass or the weeds between it and the railway, from escaping. The language of the sub-section indicates that the fireguard is to be ploughed first, because it provides that the space "between such fireguard and such line of railway is to be kept burned or otherwise freed from the danger of spreading fire." I am of opinion that such legislation was not within the power of the local legislature, because I cannot distinguish this case on principle from Madden v. Nelson and Fort Sheppard R. W. Co., [1899] A. C. 626. In Canadian Pacific R. W. Co. v. Notre Dame de Bonsecours, [1899] A. C. at p. 373, Lord Watson lays down the following: "It therefore appears to their lordships that any attempt by the legislature of Quebec to regulate by enactment, whether described as municipal or not, the structure of a ditch forming part of the appellant company's authorized works, would be legislation in excess of its powers. If, on the other hand, the enactment had no reference to the structure of a ditch, but provided that, in the event of its becoming choked with silt or rubbish so as to cause overflow and injury to other property in the parish, it should be thoroughly cleaned out by the appellant company, then the enactment would, in their lordships' opinion, be a piece of municipal legislation competent to the legislature of Quebec." Now, the legislation in this case does not deal merely with the proper looking after some work already constructed of a character similar, or somewhat similar to a ditch, but the legislature calls upon them actually to construct a fireguard, and I think that this case is within what was laid down by Lord Watson in the last mentioned case, as not being within the power of the local legislature. I think in the Mortlach case the rule should be made absolute for a certiorari.

YUKON TERRITORY.

DUGAS, J. APRIL 26TH, 1907.

TRIAL.

REX v. KEARNEY AND DENNING.

Criminal Law — Resisting Peace Officer—Arrest for Disorderly Conduct in Public Place — Licensed Theatre and Refreshment Bar—Punishment.

Trial of defendants on a charge of resisting and obstructing a peace officer.

DUGAS, J.:—The accused Kearney, being drunk, went, accompanied by his co-accused Denning, on the night of 16th April instant, to a saloon known as the "M. & N." saloon in Dawson, where there is a billiard room and a place which is qualified as a theatre, besides being licensed under the Liquor Ordinance of the Yukon Territory. There was a large crowd in the establishment. As soon as he entered the premises, Kearney became boisterous, took off his coat, took threatening positions, and wanted to fight the floor manager. In fact he did cause such a disturbance by "screaming, swearing, being drunk, and impeding and incommoding" the clients of the establishment who were present, that there is no doubt he was in contravention of sub-sec. (g) of sec. 207 of the Criminal Code.

Sergeant A. A. McMillan of the Mounted Police happened to enter the place about the same time and witnessed the disturbance. He thereupon arrested Kearney. A short time before, he had met the same two persons in the street, Kearney being already drunk, whilst Denning, though having taken some liquor, could take care of himself. Kearney was then exposing his person by urinating, standing on the sidewalk with his face towards the street. Denning begged of the sergeant not to arrest Kearney, saying that he would take care of him, and bring him home. The sergeant very judiciously permitted him to do so, but only to find them shortly afterwards in this establishment, Kearney creating a disturbance and Denning apparently being still in his company, but being quiet, as he was not at first noticed. The sergeant arrested

Kearney. So soon as they reached the street, Kearney began to resist with all his might, and then Denning interfered with threats and wanted him to be liberated. Picking up a heavy stick, he threatened to strike McMillan therewith if he did not let his prisoner go. By this the sergeant was forced to let his prisoner loose, during which time Kearney also armed himself with two sticks, and both joined in similar threats. All this to such an extent that other constables had to be called to secure their arrest.

The facts leave no doubt as to their guilt under the indictment. I, notwithstanding, refrained from entering a verdict immediately after hearing the evidence, as I wanted to be sure that an establishment of that kind was a public place in the sense of the amendment of 1894 to sec. 207, which declares that the expression "public place" in that section "includes any open place to which the public have or are permitted to have access, and any place of public resort." My doubt lay upon the interpretation to be given to the words "public resort," but I find that in the language of the law all establishments of a similar kind are considered to be so; for instance, under the words "refreshment house" in Wharton's Law Lexicon, the same is defined as "a house kept open for public refreshment, resort, and entertainment between the hours of 10 p.m. and 5 a.m., etc.

Some authorities have been cited to me by the learned Crown prosecutor, by which it is further clearly shewn that there cannot be any doubt as to the interpretation which is given the words "public resort," and that an establishment such as the one where Kearney created his disturbance is a public place under the law, and that Sergeant McMillan had the right to arrest him, as it was also his duty: Wharton's Law Dictionary, p. 780, under title "Public Houses;" Stephen's Criminal Digest, p. 115; Stroud, p. 632; Russell on Crimes, vol. 1, p. 748; Langrish v. Archer, 10 Q. B. D. 44; Ex p. Freestone, 25 L. J. M. C. 121; Bishop's Criminal Law, p. 1129; Seager's Magistrates' Manual, p. 356, and cases cited.

I may add that if this amendment of 1894 had not been enacted, such right would not have existed, notwithstanding sec. 69 of the Liquor License Ordinance of the Yukon Territory, which permits to eject, but does not permit to arrest, any one guilty of similar disturbances. I mention this as a direction for the officers of the peace who may sometimes

find themselves in some doubts as to what may be their rights and duties.

I therefore find both accused guilty under the first count of the indictment. For this offence the law is very severe, as it declares that as much as 10 years' imprisonment could be imposed.

However, I will be as lenient as possible under the circumstances, with the hope that the punishment which I am going to impose will be a sufficient lesson not only for the accused but for any one who may have the same disposition. Both of them are condemned to be imprisoned during the space of three months at hard labour.

YUKON TERRITORY.

DUGAS, J. MAY 13TH, 1907.

SINGLE COURT.

GALLIGHER v. BONANZA CREEK GOLD MINING CO.

Injunction—Application for Interim Order—Mining Operations—Injury to Neighbouring Claim.

Application by plaintiff for an interim injunction.

DUGAS, J.:—Application was made for an injunction, upon the single affidavit of the plaintiff, to restrain the defendants from continuing with their hydraulicing operations, the plaintiff alleging that his claim was being damaged through rocks and heavy tailings passing through the cribbing of the defendants and covering the same, in certain places as much as 10 feet deep.

Having notified the defendants to appear on short notice, and upon representations made, I issued an interim order to the effect of forbidding the defendants from so damaging the plaintiff's claim and to appear again before me on Friday last, the 10th instant, with the understanding that the plaintiff would be allowed to file further affidavits and the defendants to answer them.

On Friday there were 7 affidavits filed by the plaintiff and 11 by the defendants. Plaintiff's witnesses strongly proved his case, whilst defendants' did as much for them.

The parties then agreed that I should view the ground. I consented to go there, upon the understanding that the Gold Commissioner and the Mining Engineer of the Territory would accompany me and give me the help of their experience. I therefore proceeded to the claim on Saturday last, the 11th instant, with the several parties and their counsel present, and, after having heard all remarks made on behalf of each of them, and viewed the workings of the defendants, and the claim of the plaintiff, I came to the conclusion that, for the moment, no injunction should be granted against the defendants, as I could not see anything else than water and fine silt passing through the cribbings, which in no way could damage plaintiff's claim; and, as it is impossible, either by the affidavits or by the viewing of the claim of the plaintiff, to decide whether or not some heavy tailings of rock and gravel were allowed to pass when the application for an injunction was made, I came to the conclusion to leave the whole matter to the trial Judge, dismissing the application for an injunction, but with liberty to apply anew for an injunction upon other affidavits, should the defendants hereafter not conform themselves to law in their workings. All the costs incurred until now to be determined by the trial Judge.

YUKON TERRITORY.

MAY 13TH, 1907.

FULL COURT.

THOMPSON v. SPARLING.

Appeal to Yukon Territorial Court en Banc—Time for Appealing—Notice of Appeal—Vacation—Appeal Late—Objection — Notice — Extension of Time—Discovery of Fresh Evidence.

Apeal by plaintiff from an interlocutory order of MACAULAY, J., dated 26th November, 1906, under which a commission issued on behalf of the defendant for the purpose of examining defendant as a witness on behalf of him-

self outside of the Territory. This order was made during vacation.

The appeal was heard by DUGAS, CRAIG, and MACAULAY, JJ.

C. W. C. Tabor, for plaintiff.

F. G. Crisp, for defendant.

DUGAS, J.:—The notice of appeal is dated 15th March, 1907. By sec. 512 of our Judicature Ordinance the time for service of notice of appeal upon any interlocutory order is fixed at 15 days from the date of the order, unless enlarged by the Judge or Court.

On the first day of the sitting of the Court en banc the appellant presented a motion, notice of which had previously been served upon the respondent, asking to be permitted to adduce new evidence, upon which the respondent objected that the appellant was not regularly before the Court, as his notice of appeal had not been served within the 15 days fixed by law.

The sittings of the Court and vacation are settled by secs. 556 to 558, inclusive, of our Judicature Ordinance. I find nothing therein which applies to the contested business of the Court en banc during vacation. The whole enactment refers to the Territorial Court presided over by a single Judge, and to the Judges of that Court, with the exception of sec. 558, which fixes the months during which the Court en banc will sit, with the proviso that it will not sit between 25th September and 15th March in any year.

It seems, therefore, that as to the proceedings before this Court, except its sittings, there is no vacation, and that the delays for pleadings must be observed accordingly. This being the law, there is no doubt that the appellant was too late in serving his notice of appeal.

It might be argued that parties may suffer and be taken by surprise under such a state of things. In answer it may be said that no litigant can be forced to proceed with contested business except as in sec. 557 provided; and if by order of a Court or Judge it must be taken for granted that the Court or Judge, as well as the litigants, will be careful in having no proceedings unless they are in a condition to act afterwards within the delays fixed by law, whether before the Court or Judge, or the Court en banc. Besides, an extension of time can always be easily obtained.

We have already decided in the case of Langevin v. Hebert, 4 W. L. R. 367, that objection could be taken viva voce to an appeal taken out of the delays fixed by law. I see no reason to change our views on this point, though I consider that in order to bring before this Court a fact or facts which may have happened before a Judge or a Court below, a motion sustained by affidavits should be made, and for this reason my views are that we could not take cognizance of what happened before Mr. Justice Macaulay, or afterwards, by way of consent or acquiescence on the part of the respondent, if otherwise we did not feel it our duty to dismiss the appeal as coming too late.

Taking those views in the case, this disposes of the motion made by the appellant, which, for that purpose, we cannot entertain. The appeal is therefore dismissed with costs.

CRAIG, J.:—In an action by the present plaintiff against Mickle et al., a certain sum of money was paid into Court by virtue of an execution in that case, which money was claimed by the defendant Sparling in that action, by virtue of an assignment of a judgment alleged to be made by Thompson to Sparling. It appears from the material presented that on 8th August, 1900, Thompson, this defendant, mortgaged to Lisle & Sparling, a firm of solicitors, of which the present defendant is one, certain lands to secure the sum of $3,000, by the mortgage recited to be for a fixed debt of $2,000 owing to Lisle & Sparling and $1,000 owing to a solicitor Smith, which the firm of Lisle & Sparling covenanted to hold in trust and pay when collected. Upon the return of the execution by the sheriff in the case of Thompson v. Mickle, the defendant Sparling procured a stop order retaining the money in Court under that execution, under his alleged assignment. Thompson denied his right, and an interpleader order made by Mr. Justice Macaulay on 22nd October, 1906, directed an issue to be tried as to their rights to that fund in Court. The defendant Sparling is now residing in the city of Winnipeg and practising there, and a motion was made for a commission to issue to examine him in Winnipeg. The commission was directed to issue, and by the order for the commission it was directed that the accounts between the parties be taken from the date of the mortgage, and that all accounts between the plaintiff and the defendant and between the plaintiff and Lisle & Spar-

ling be taken as settled and agreed upon at the date of the mortgage at the amounts set forth therein. Pursuant to the order for commission, evidence was taken of Sparling and others in the city of Winnipeg. On 7th February both parties by their solicitors consented to the taking of the evidence of Florence Sparling under the same commission, and the time for the return of the commission was extended to 1st May following. On 15th March, 1907, plaintiff appealed against the order of Mr. Justice Macaulay limiting the taking of the accounts between the parties to a time subsequent to the date of the mortgage. That notice of appeal was served on that date, and the appeal regularly set down. The solicitor for the defendant Sparling not approving of the appeal book and doing nothing in the matter until the first day of the sitting of the Court en banc, the plaintiff, on that day, by his solicitor, moved to allow the admission of new evidence discovered since the hearing, under Rule 515. He seeks to have admitted a letter of Lisle & Sparling and a memorandum made by Mr. Smith, the solicitor mentioned in the original mortgage. The affidavit of the solicitor on the motion to admit new evidence sets out that subsequent to the date of the order he discovered evidence, not known to him or the plaintiff at the time, in the hands of one J. K. Macrae, that the evidence was not at the time within his power or knowledge, identifying the writer of the letter. Nowhere does he bring himself within the rules laid down in the authorities and covered by the judgment of this Court in Raymond v. Faulkner, 2 W. L. R. 461, and in Collins v. Vestry of Paddington, 5 Q. B. D. 368. Before this motion proceeded, however, counsel for the defendant took objection to the appeal, on the ground that the notice of appeal was given too late, that under our Rule notice of appeal from interlocutory orders must be given within 15 days. That this was an interlocutory order is clear. In answer it is alleged that vacation is excluded from the time to be counted for the giving of notice; but on referring to our Rule respecting vacations it will be seen that it is as follows: "During vacation no contested business except as in this section provided shall be transacted, and no party to a case in which the defendant is appearing shall be compelled to deliver any pleading; provided that during vacation notice of motion to set down a cause for trial may be given and heard. Any ex parte business and any contested

business, if the parties to such contested business by their solicitors or counsel consent, may be transacted." This Rule does not cover appeals to the Court en banc, and nowhere in our Rules is any provision made excluding vacation for notices of appeal to the Court en banc. In any case if this Rule is to apply to appeals to the Court en banc, and the business can be called contested business, it was by consent of the parties carried on during vacation. It is true the order was made prior to vacation, yet the parties went on and took the benefit of the order and carried on the business consequent upon the order during vacation. I think the defendant is clearly out of Court, by reason of the fact that notice of appeal was not served in time.

As to the objection taken that a substantive motion should have been made upon notice by the defendant to set aside the appeal on that ground, I think we are bound by the judgment of this Court in Langevin v. Hebert, 4 W. L. R. 367, where a similar objection was made without notice of motion formally served, and there the Court held that the motion was regular, and I find that in the case of Collins v. Vestry of Paddington the exception was apparently taken in that case as a preliminary objection without notice. The plaintiff, however, does not bring himself within the rules as to the admission of new evidence, because nowhere in his affidavit does he indicate that if the evidence which he produces had been produced before the trial Judge any different result would have followed; he does not shew what efforts he made to get this evidence before the motion was made, and he does not ask for the admission of oral or affidavit evidence to prove either of the documents produced by him. He simply asks to have the documents produced. Neither of the documents by itself can possibly affect the result; neither of them proved itself; and it would be necessary to issue a new commission to examine both Mr. Sparling and Mr. Smith, the writer of the letter and the maker of the memorandum, before this Court could be informed as to what their meanings were. There is no motion or request that the time for appeal be extended. If that were made, the Court might entertain it under the authority of Collins v. Vestry of Paddington and also under the authority of the case of D'Ivry v. World Newspaper Co., 17 P. R. 543, if it appeared to the Court that the plaintiff always had a bona fide intention of appealing, and that by some inadvertence

his notice had not been served in time, and where the defendant would not be prejudiced by the extension of the time. There is no suggestion of that, and no request along those lines, made by plaintiff in this case. It would be unfair now at this date to admit the evidence without a further examination of Mr. Sparling, or his wife, or the parties who can throw light upon the matter of these documents. I do not think any intention to appeal from the order was in the minds of the parties until long after, and under the authorities of Videan v. Westover, 34 C. L. J. 162, Spencer v. Cowan, 32 C. L. J. 782, and Marina v. Sproat, 39 C. L. J. 84, the defendant, having taken the benefit of part of the order, is not in a very good position now to object to the carrying out of the whole of the order. I think the objection taken to the time of the service of the notice of appeal is fatal to his appeal, and there being no merits shewn to the Court entitling him to any extension of time, and in fact no request made, I do not think the Court should now exercise rights which it might have to extend the time. I think, therefore, that the appeal should be dismissed.

YUKON TERRITORY.

CRAIG, J. MAY 27TH, 1907.

CHAMBERS.

BRINDAMOUR v. ROBERT.

ROBERT v. BRINDAMOUR.

Trial—Application for Order Directing Trial by Jury—Rule 168—Time—Discretion.

Motion by Brindamour for an order for the trial of both actions by jury.

Henry C. Bleecker, for Brindamour.

Frank J. McDougal, for Robert.

CRAIG, J.:—In these two cases the parties are the same, suing for different remedies, the one action being for trover and the other for trespass.

The contest arises over the right of Brindamour to share in a certain lay agreement or lease in connection with certain mines owned by Robert, and very many questions of fact arise on the issues joined between the parties.

I see by the pleadings that Robert charges Brindamour with appropriating and converting to his own use a large quantity of gold dust, the product of the mines, and I know as a fact from the Court records that already in this case Brindamour was charged with theft of this same gold dust.

Brindamour now applies for trial by jury in both cases. In neither case did he ask for a jury under Rule 168, which is as follows: "When any party demands or is entitled to have the questions of fact in any action tried by a Judge with a jury, he shall, if the plaintiff, demand a jury in his notice of trial, to be given as hereinafter provided, and if a defendant, he shall make such demand by giving notice thereof in writing to the plaintiff's solicitor within 4 days from the time of the service of notice of trial upon the plaintiff, or within such extended time as the Court or a Judge allows, or in the notice of trial to be given by the defendant as hereinafter provided, and thereupon the said questions of fact shall be so tried."

It is contended by counsel for Robert that in a case where a party is a plaintiff, that is, in the one case where an action was brought by Brindamour, his right to have a jury is entirely gone, that he should have asked for a jury with his notice of trial, and that the Judge has no discretion to make the order asked for; that in the other case of Robert v. Brindamour, where Brindamour is the defendant, he should have applied within the 4 days from the time of the service of notice of trial; that the 4 days having expired, the Judge should not now use his discretion to extend the time provided in the Rule.

There is no reason why this case should not be as well tried by a Judge as by a jury; but in this Territory parties have an absolute right to a jury if they apply under the Rule. It is argued that the Judge has no discretion whatever in the case of a plaintiff who fails to ask for a jury with notice of trial, and only has discretion in the case of a defendant who fails to ask for it within the 4 days. It is hard to understand why the Rule should have made this distinction, but evidently the reading of the Rule would seem to imply that this is a proper construction of the Rule. Brin-

damour's counsel relies upon the North-West Territories Act, which is our Act affecting the administration of civil justice, sub-sec. 2 of sec. 88 of which reads as follows: "Provided that in cases where the claim, dispute, or demand arises out of tort, wrong, or grievance, and in which the amount claimed exceeds $500, or if for a debt or on a contract in which the amount claimed exceeds $1,000, or for the recovery of the possession of real property, if either party demands a jury, or in any such case in which a Judge thinks fit so to direct, he may direct that all questions of fact therein shall be tried and determined by a sworn jury of 6 in number, summoned in the manner hereinafter provided as in criminal trials."

Brindamour's affidavit asking for the order is rather meagre, but one can gather from the pleadings that several very acute questions of fact and contradiction will arise—naturally so, as the complaint is based upon the wrongful conversion by Brindamour of gold dust. It certainly would be a proper case for trial by jury if the charge were brought criminally for this conversion, and Brindamour would have an absolute right to a jury if he had applied at the proper time. I do not think the Judge here has any discretion whatever, once a jury is properly applied for, to strike that jury out or dispense with it at any time. The only question now is—have I a right to grant a jury trial? Or does Rule 168 limit absolutely the right of the plaintiff in the matter. It would seem that the Rule fixes the mode by which a litigant can obtain a jury under the Act; but I think that the Act, being broader than the Rule, gives me discretion to allow a jury at any time I see fit, or of my own motion to order a jury. Particularly do I think it should be done in this case, because by consent both cases are set down for the same day, and, as the evidence is the same in both, they will be tried together or ought to be tried together. In the exercise of my discretion, I would certainly give a jury in a case where the defendant has a right to apply, and where I have by the Rule a right to extend the time beyond the 4 days, and it would therefore be improper to have one case tried by a jury, and the other by a Judge, where the issues are the very same, and the result might possibly be a conflict between the verdicts rendered upon the very same state of facts. So that there will be an order for a jury in both cases.

YUKON TERRITORY.

CRAIG, J. MAY 27TH, 1907.

TRIAL.

McDONALD v. WINAUD.

Contract—Sale of Mining Claim—Promise to Pay Fixed Sum Provided it be Taken out of Claim—Issue as to Whether Working Expenses to be Deducted—Equitable Lien for Unpaid Purchase Money—Effect of Resale of Claim before Time for Payment.

Action to recover two sums of $700 and $600, in the circumstances stated in the judgment.

H. Tobin, for plaintiff.

G. Black, for defendants.

CRAIG, J.:—The plaintiff sues as the holder of an undertaking to pay in the following words: "$700. Dawson, Y. T., 20th December, 1905. Know all men by these presents that I, Herbert Winaud, of Dawson, Y.T., do promise to pay to John E. McDonald on or before October 1st, A.D. 1906, at the Canadian Bank of Commerce, Dawson, Y.T., the sum of $700, provided this sum be taken out in gold and gold dust from creek placer mining claim number 13 below Discovery on Hunker Creek, Yukon District. Herbert Winaud."

He also sues as the holder of another agreement in similar form for $600, payable on 1st July, 1906, but in this subsequent one after the words "gold dust" the following words are inserted—"above actual working expenses."

The facts of the case are these. McDonald and a partner named Mackenzie owned each an undivided half interest in the placer mining claim in question, No. 13, and on 20th December, 1905, McDonald sold out to Winaud, who was the admitted agent for the other defendants, his undivided half in this claim. Afterwards, on 27th December, Mackenzie comes in and sells his half to the same parties under the agreements produced, the difference in the formal documents being that in the case of McDonald the words "above actual working expenses" are omitted from his agreement. McDonald says that these words should not be in his docu-

ment, the defendants contending the contrary. The documents are in the handwriting of one Jenkins, who was made a party defendant at the trial. This man Jenkins is the main witness for the defence, and he says that considerable wrangling took place over this very provision; that these words were the real bone of contention between Winaud and McDonald; that after they had come to terms the document was drawn, and after considerable erasures in it he made a copy of what was the real agreement or what he supposed to be the real agreement arrived at between the parties, and this is the document sued on, except that by a mistake in copying he omitted the words in dispute. He says he made a copy of it, which is produced at the trial and marked exhibit C., and in the copy the words in dispute are contained. He says he made this copy for the use of Winaud. It is not signed by McDonald, and both copies appear to have been written on the paper of the Yukon Hotel, Jenkins saying that after making the copy which was signed as the contract, which omits the words, he continued on the same pad of paper and wrote another one. The documents bear out that contention. He is supported in his evidence by Winaud, who says that the real agreement should contain the words mentioned, and a witness Williams says that McDonald asked him to collect the money under the agreement for him, some time before Mackenzie agreed to sell his interest, and that when he spoke to him he told him that actual working expenses were to be allowed before he was paid, or words to that effect. In the document which represents the interest of Mackenzie it is made payable to McDonald as the former one, because McDonald was to act as Mackenzie's agent, and more than that, Mackenzie was indebted to McDonald, and this was the mode taken to secure payment to McDonald. The words are here, and, although McDonald was in the room when Mackenzie sold his interest, and knew that these words were inserted, he made no objection or protest at all until he got outside and spoke to Mackenzie privately, as he says. He now explains his silence then by the fact that it did not concern him to make any objection; that Mackenzie was drinking at the time, and he didn't want to interfere with the deal. Of course the defence raises the plea of mutual mistake and endeavours to convince the Court that there was a mutual mistake at the time the documents were drawn, and that now McDonald, finding the agreement in his favour, insists on carry-

ing out the document as it is written. In McDonald's favour is the written document, the fact that this matter was the sole or main point in dispute in settling the terms of the agreement, that both documents are in the handwriting of an interested party, Jenkins, one of the defendants, who could easily have written another copy containing these words afterwards. The defendants went on to work the claim, and they say they exhausted every effort in an endeavour to produce a profit, but failed; that the claim does not pay to work; that no one can make it pay. The evidence on this point is not at all convincing to my mind. The defendants produced in Court a sketch drawn on a piece of brown paper about 6 inches by 4, a very crude thing, from which I, sitting as a jury, can form no opinion whatever as to the nature of the workings on the claim or very little opinion. It is quite certain that so far they have not taken out gold enough to pay working expenses, and in the case of the latter agreement if the payment of that were to depend on the result of the operations, then it should not be paid. Fortunately, I think I shall not have to give any opinion as to which of these parties I must believe. Some one is not telling the truth; that is quite clear. And in a Territory like this, where perjury is such a common occurrence, I am glad not to have the responsibility of saying who, in my opinion, is the guilty party, because I think this case must be determined upon another point altogether.

The defendants on 5th May, 1906, sold the property in question to Jones and Moncrief for $2,000, and have been paid. Before this McDonald, hearing or being told by the defendants that they could not pay, owing to the failure of the mine to produce, offered to take the mine back from them, shewing good faith on his part and a belief in the value of the property. By that agreement they reserved the right to enter upon the claim and work it with 4 extra men, making 8 men in all. At the time at which this property was sold they say in their evidence now that they had made a thorough and exhaustive working of the claim, and that it would not pay. It might naturally be asked why they reserved the right to enter upon the claim and further work it. Jones, one of the men who bought, says that on the sale Winaud, who seems to have been the active party in making the negotiations, told him that down the centre of the claim there was a part which contained good pay, but that it was wet, and Jones says that he and Mon-

crief are quite satisfied with their bargain to-day and now hold the property at $5,000. We find these defendants saying that they have exhausted the claim and that no gold remains in it worth taking out. They certainly have not satisfied me that that is true. It may be that if these men owned the claim themselves and could not afford to work it in any other way than by what is known as the ordinary placer method, that is, by sinking shafts and hoisting, they would as a business venture for themselves and affecting only themselves, be justified in abandoning the claim. But there are other methods of working claims which might have produced good results. The claim might have been hydrauliced, worked by open cutting or by dredging. Now, I do not think that the parties had in contemplation working by hydraulicing or by dredging, and in interpreting an agreement of this kind one must interpret it bearing in mind the intention of the parties to it. I think this is clear from the authorities. But no evidence was offered to shew that the claim might not have produced good results by open cutting. It is shewn that the adjoining claim is being operated in that manner, and, so far as the evidence goes, I must conclude that this would have been a reasonable way to operate this claim if it could not have been profitably operated by sinking and drifting. The trouble seemed to be that water entered the shafts and drove the parties out, and it might have been that if this water could have been got rid of, either by drainage or pumping, the claim could have been worked profitably. The defendants have put it out of their power now to carry out this contract and pay the plaintiff. They have entirely parted with the property for a very fair sum in money, and now refuse to apply any part of that sum to the payment of this claim. Whatever might have been the result if they had continued to hold the property and work it, is another question, but I think they have put themselves out of Court by their own action in parting with the property. The agreements are silent as to the mode of operation or as to what shall constitute actual working expenses, and are very bald in their terms; but I must conclude that it was the intention of the parties to bona fide work the claims and exhaust the gold in it by every usual and proper means, not by any extraordinary method such as dredging. I do not think the parties contemplated that, but by other and more usual placer methods, such as open cutting and drifting. The author-

ities upon this point, I think, are clear. The parties cannot be put back in their old position, and, while no mortgage or lien was taken, yet I think the plaintiff has an equitable lien upon the claim for the amount of the unpaid purchase money and an equitable right to the honest endeavours of the defendants to pay the purchase money out of the claim: see Cyc., vol. 16, p. 68; and as to the legal effect of parting with property in the manner in which these parties parted with it before the expiry day of payment, see In re London, Hamburg and Continental Exchange Bank, Emerson's Case, L. R. 1 Ch. p. 433, and Sanders v. Baby, 5 C. P. 441, a case very much in point and very similar to this one, where by an agreement dated 18th June, 1847, the defendant agreed to sell to the plaintiff the net profits for two years from the date of the agreement out of certain shares in the Lake Huron and St. Mary's River Mining Company for $375, and on the 25th November, 1847, the Lake Huron and St. Mary's Company sold to the Montreal Mining Company certain tracts of land therein described, and all the tools, engines, etc., for £33,250, to which sale the defendant assented; held, that the defendant having disposed of his stock which represented his interest in the mine before the arrival of the period at which he was to sell the profits to the plaintiff, he placed it out of his power to fulfil his agreement and so broke his contract, and the plaintiff became immediately entitled to sue for the breach thereof; also Wolf v. Marsh, 3 Morrison's Mining Reports 204, where Marsh promised in writing to pay $440 to Wolf, provided, however, that the note should be void if certain coal mines failed to yield a profit to Marsh, and he sold the mines before they yielded a profit; held, that a cause of action accrued against Marsh immediately upon the sale, because he voluntarily put it out of his power ever to realize a profit on the mines; McIntyre v. Belcher, 14 C. B. N. S. 660; Stirling v. Maitland, 5 B. & S. 840, the head-note being: "If a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative;" Pollock on Contracts as to the general principles, pp. 398 to 409, inclusive.

Upon the whole case I am of the opinion that the plaintiff must succeed for the amount sued for, with costs.

YUKON TERRITORY.

MACAULAY, J. MAY 28TH, 1907.

SINGLE COURT.

SIEMER v. JOHANSON.

Judgment—Application by Defendant to Set aside Judgment of Court after Trial in Absence of Defendant—Delay in Applying — Negligence of Defendant — Reference for Taking Accounts under Judgment Proceeding without Notice to Defendant—Setting aside Report on Terms—Costs.

Application by defendant Johanson for an order setting aside the order for judgment made by MACAULAY, J., on 17th July, 1906, the taking of accounts, and the report of the referee on the taking of accounts, dated 18th July, 1906, and the taxation of costs, dated 25th July, 1906, and for an order, if necessary, extending the time for defendant Johanson to move to set aside the order, judgment, taking of accounts, report, and taxation of costs, and for such other and further order as the Court might deem fit, upon the grounds, amongst others, that defendant Johanson had a good defence to this action on the merits, and that the judgment and other proceedings were taken and obtained against him in default and without his knowledge; that there was no proper appointment made or taken out for the taking of accounts, and that no notice of any appointment was served on defendant Johanson, or on anybody representing him; and that there was no proper service of notice of taxation of the costs.

J. P. Smith, for defendant Johanson.

J. K. Macrae, for plaintiffs.

MACAULAY, J.:—The proceedings shew that the writ of summons was issued and statement of claim filed in this action on 5th August, 1903; that an appearance was entered for defendant Johanson on 20th November, 1903; defence filed on 5th February, 1904; joinder and reply filed on 30th December, 1905; notice of change of solicitors filed on 29th March, 1906; notice of trial given on 29th March, 1906;

and that the action came on for trial before myself on 17th July, 1906, and judgment was given for plaintiffs in the absence of defendant Johanson.

The defendant, in his affidavit used on the motion before me, states that on or about 10th January last he received notice that judgment had been obtained by plaintiffs against him in this action, which was the first intimation he had had of the judgment having been obtained against him in the Yukon Territory.

The defendant Johanson is now residing at Gold Bar, in the State of Washington, and, although this application did not come on for hearing before me until 30th April, 1907, I am satisfied that defendant proceeded with due diligence after 10th January last, and that, owing to the peculiar conditions that prevail in this country, it was impossible for him to have made this application sooner than he has done, as instructions had to be received here and material forwarded to Seattle and Vancouver before the affidavits to be used on this motion could be completed.

There is no doubt that, from the material before me, no great effort was made to bring this action on for trial until the autumn of 1905. An affidavit is filed on behalf of defendant Johanson by Mr. H. E. Ridley, a former member of the firm of Pattullo & Ridley, who were the solicitors for the defendant Johanson from the time appearance was entered for him until some time in the winter of 1906. Mr. Ridley in his affidavit states that between the date of the delivery of the statement of defence and counterclaim and 1st October, 1905, about which latter date he left the city of Dawson and the Yukon Territory, no serious effort was ever made by or on behalf of the plaintiffs to bring this action on for trial; that he always believed defendant Johanson had a good defence to the action, and that he had advised defendant Johanson that he did not believe plaintiffs would ever bring the action on for trial.

An affidavit of Mr. H. S. Tobin, who was a member of the firm of White, Davey, & Tobin, who were the plaintiffs' solicitors, has been filed and used on behalf of the plaintiffs, and Mr. Tobin in his affidavit states that the trial of this action was delayed at the request of the defendant Johanson's solicitors, who wished further time to communicate with their client, who, at that time, was living in Eagle, Alaska, and

who afterwards resided in Fairbanks, Alaska, until, as he states himself in his affidavit, about the month of September, 1905, when he left for the outside and has since not returned to Alaska or the Yukon Territory.

I may state that the plaintiffs' solicitors were originally Messrs. White, Davey, & Tobin, of Dawson, and the defendant Johanson's solicitors were originally Messrs. Pattullo & Ridley, of Dawson. In the early winter of 1906, after the death of Mr. Arthur Davey, a member of the firm of White, Davey, & Tobin, the firm was dissolved, and the firm of Messrs. Pattullo & Ridley having become dissolved, Mr. Ridley also leaving the Yukon Territory, a law partnership was formed between Mr. Pattullo and Mr. Tobin, who then communicated with both the plaintiffs and the defendant Johanson and informed them that owing to the partnership entered into between Mr. Pattullo and Mr. Tobin the respective firms could no longer act for other parties. Mr. J. K. Macrae was then appointed solicitor for the plaintiffs, and, on 28th February, 1906, Mr. Pattullo wrote a letter to the defendant at Seattle, Washington, informing him that he could no longer act for him and he would hand the papers over to some responsible solicitor, and, at the same time, notifying him that Mr. J. P. Smith, barrister, of Dawson, would communicate with him. The defendant Johanson states, in his affidavit, that this was the only letter received by him from the firm of Pattullo & Ridley, or any member of that firm, between the time of his leaving Alaska until 10th January, 1907. He states that he cannot now find that letter, but he remembers that it advised him of the dissolution of the partnership of the firm, and that, owing to certain changes in the partnership, they would be unable to any longer represent him in the action, but stating that they would turn the case over to responsible solicitors who would look after his interests and care for the case as occasion required, giving the said solicitors his address and otherwise establishing such relations between them as would enable the solicitor selected by them to communicate with him. The defendant further states that he was informed by Mr. Ridley, of the firm of Pattullo & Ridley, that their firm had written him on 31st October, 1905. He states, however, that he received no such letter.

The affidavit of Mr. J. P. Smith, among other things, states that on 11th March, 1906, he wrote to the defendant

Johanson notifying him that the firm of Pattullo & Ridley had dissolved and that Mr. Pattullo and Mr. Tobin had formed a partnership, and that the new firm was obliged to retire from both sides of the case, and that Mr. Pattullo had handed all the papers in the action to him and had asked him to communicate directly with the defendant Johanson. Not having heard from the defendant Johanson, he again wrote him on 26th May, 1906. He addressed a copy of that letter to Fairbanks, Alaska, and one care of Fred. Bausman, Esq., Alaska Building, Seattle, Washington, which latter place he had understood was the defendant Johanson's Seattle address. That both letters addressed by him to the defendant Johanson at Seattle were returned to him at Dawson, not having been delivered.

The defendant states that after leaving Fairbanks, Alaska, in September, 1905, he spent a week in the city of Seattle, and then was travelling about, and did not return there until the month of November, 1905. He was then absent until the month of February, 1906, and left the city of Seattle about 1st March, 1906, and did not return until 4th July, 1906. That in the meantime he had been travelling about throughout the United States, and he believes that is the reason the letters did not reach him. He states that the letter written to him by Mr. Pattullo on 28th February, 1906, had been mislaid and consequently was not used on the motion before me. I, however, directed that a copy of the said letter should be produced before me and also a copy of the letter of 31st October, 1905, written to him by Messrs. Pattullo & Ridley. The latter letter, he states, was never received by him. On examining a copy of the letter of 28th February, I find the contents of it to be substantially what the defendant Johanson, in his affidavit, has sworn it contained. I find that the letter of 31st October, 1905, written to defendant by Messrs. Pattullo & Ridley, which the defendant Johanson says he did not receive, did notify him that the plaintiffs intended to go on with the action, and that it was necessary that they should hear from him and receive instructions. He admits that he did not reply to the letter written by Messrs. Pattullo & Ridley on 28th February, 1906, because he was expecting to hear from the solicitor to whom they handed the papers. He further admits that when he returned to Seattle, on or about 4th July, 1906, he was told that some mail had ar-

rived there for him, but that, as it had not been called for, it had been sent to the dead letter office. Of course, there was no intimation to him that such letters were from Dawson, but the defendant knew that he had a law suit pending in Dawson. He knew that Messrs. Pattullo & Ridley had written him that they could no longer act for him; that the solicitor whom they had handed his papers to had sent no communication to him that he had received; and still he does not move in the matter or communicate with Mr. Pattullo in Dawson, and makes no effort to find out the state of the cause until he is informed on 10th January, 1907, that judgment has been obtained against him.

Mr. J. P. Smith, the solicitor here to whom the papers had been handed, not having heard from the defendant Johanson, did not appear for him at the trial of this action, which was not proceeded with until the month of July, although in March Mr. Macrae did serve notice of trial immediately after being appointed solicitor for the plaintiffs, but agreed to wait until the month of July in order that the defendant Johanson might be communicated with in the meantime.

Many authorities were cited to me on behalf of the appellant. In Watt v. Barnett, 3 Q. B. D. 363, Jessel, M.R., at p. 366, says: "I agree, however, with both the learned Judges that, though the service may have been regular according to the order, still the Court has power to set aside the judgment where that is necessary for the purpose of doing substantial justice. The mere fact that the defendant has not had notice of the proceedings is not, in itself, sufficient—but if he shews that he had no notice and that he has a good ground of defence, it is reasonable that he should be let in to defend."

In McDonald v. McDonald, 7 R. & G. (N.S.) 22, it was held that if the defendant accounts for his non-appearance he will be allowed to come in and defend after judgment.

In Atwood v. Chichester, 3 Q. B. D. 722, it was held that where no irreparable wrong will be done to a plaintiff who has obtained judgment by default, lapse of time is not a bar to an application to set it aside.

And in Sandhoff v. Metzer, 4 W. L. R. 18, Wetmore J., says: "I have, however, repeatedly held that mere delay

will not prevent an application to set aside a regular judgment on the merits from being successful, provided that no irreparable injury will be done to the plaintiff thereby."

Many other authorities were cited, and, among others, Coles v. Ravenshear, [1907] 1 K. B. 1, was cited on behalf of the plaintiffs opposing this motion. Collins, M.R., in this case, which was an application for leave to appeal from an order of a Divisional Court after the expiration of the time allowed for appealing, says, at p. 4 of his judgment: "In the case of In re Manchester Economic Building Society, 24 Ch. D. 488, Bowen, L.J., in giving judgment to the same effect as Brett, M.R., and Cotton, L.J., laid down what seems to me to be the sound general rule on this subject, and that which I should desire to follow. He said, with regard to the circumstances under which the discretion of the Court to grant leave to appeal should be exercised: 'The Rules leave the matter at large. Of course, it is to be exercised in the way in which judicial power and discretion ought to be exercised, upon principles which are well understood, but which had better not be defined in a case except so far as may be necessary for the decision of that case—otherwise there is the great danger, as it seems to me, of crystallizing into a rigid definition that judicial power and discretion which the legislature and the Rules of the Court have for the best of all reasons left undetermined and unfettered. If the appellant is asking for what is evidently unjust, it is clear that he ought not to have it; if he is asking for what may lead to injustice, he ought not to have it, except on terms which would prevent any injustice possibly being done, and, for that reason, if any of the respondents here had shewn that injustice was likely to arise in their particular case, I think terms ought to have been imposed; but, if the person who is asking for leave to appeal after 21 days is only asking for what is just, why should not he have it?' Therefore, where there has been a perfectly bona fide mistake, and no damage has thereby been done to the opposite party which cannot be sufficiently compensated by costs, I should, if the matter were at large, be of opinion that special leave to appeal should be granted. But in this case I do not feel myself at large in the matter; for, though the current of authority on the subject has not been uniform, there are certainly one or two, if not more, authorities, applicable to the present case, which

appear to me to be practically binding upon us in this Court, and which compel me to arrive at a different conclusion from that to which I might in the absence of authority have come. The last case on the subject appears to be In re Helsby, 1 Q. B. 742. In that case, with reference to r. 130 of the Bankruptcy Rules, 1886, which provided that, 'subject to the powers of the Court of Appeal to extend the time under special circumstances, no appeal to the Court of Appeal from any order of the Court shall be brought after the expiration of 21 days,' Lord Halsbury, L.C. said: 'The rule gives the Court power under special circumstances, to extend the time for appealing. Here there are, in my opinion, no special circumstances. A mistake was made by a clerk of the appellants' solicitors. If that is a special circumstance, then in every case in which a blunder has been made about the time for appealing, the time ought to be extended. I do not think that is the meaning of the Rule. The notice of appeal was served too late, and I can see no ground for extending the time.' Lopes, L.J., adopted the opinion of the Lord Chancellor on the subject; and Davey, L.J., said: 'Upon the question whether the time ought to be extended, speaking for myself, I am inclined to adopt the view of the late James, L.J., that a party has a vested right in an order of the Court in his favour, and ought not to be deprived of an advantage given to him by the Rules, unless there has been on his part some conduct raising an equity against him, or in a case of inevitable accident.'"

In the case before me the material used on behalf of the plaintiffs shews that the plaintiff Carlson is now out of the Yukon Territory and at some place in the territory of Alaska, but his whereabouts is not known to his co-plaintiff; that the plaintiffs were always anxious to proceed with the trial of this action, but their solicitors informed them that the delay was caused by the request of the defendant Johanson's solicitors to allow them time to communicate with their client.

Then when I consider the statements contained in the affidavit of the defendant Johanson himself, filed on this application, I am of opinion that he has been so grossly negligent in his conduct in regard to this action, especially from the time he received the letter from Messrs. Patullo & Ridley, written on 28th March, 1906, until 10th January,

1907, when he discovered that judgment had been obtained against him, that I should not exercise the discretion allowed to me under the authorities of Rules of Court in his favour by opening up the judgment which was obtained against him on 17th July, 1906, in open Court before me, even upon terms.

However, in regard to that part of the application which asks that the taking of accounts and the report of the referee on the taking of accounts, dated 18th July, 1906, and the proceedings therein subsequent to that date, be set aside, on the ground that there was no proper appointment made or taken out for the taking of accounts, and that no notice of any appointment was served on the defendant Johanson or anybody representing him, I am of opinion that the plaintiffs' solicitor was irregular in his proceedings, it being admitted that after the trial before me, wherein I directed that the case be referred to the Clerk of this Court to take the accounts between the plaintiffs and defendants, the solicitor proceeded with such accounting without having served any notice of appointment to take accounts on the defendant, or on any one representing him, or without having obtained an order dispensing with such service. However, under Rules 546 and 547, such irregularities may be waived by the Judge to whom application is made, if he so chooses in his discretion.

While, however, I am of the opinion that the defendant Johanson was so negligent before the trial of this action that, notwithstanding it is sworn to both by himself and by his former solicitor, Mr. Ridley, that he had a good defence on the merits, I am of the opinion that I should not use my discretion in his favour. I still think that after 18th July, 1906, some notice should have been given to him of the intention to take accounts between the parties as directed by me, and that, as no such notice has been given, the taking of accounts and the report of the referee dated 18th July, 1906, and all subsequent proceedings taken thereon, should be set aside, but, as the defendant, from the time he came to Seattle on or about 4th July, 1906, until 10th January, 1907, when he heard that judgment was obtained against him, had made no effort to ascertain the state of this cause, that such proceedings should only be set aside upon terms, and the terms I would impose are that

the defendant should be allowed in on the taking of accounts in this case as if such judgment had not proceeded further than my order of 17th July, 1906, upon payment of all costs incurred in this action up to that date, and upon further depositing security in this Court for the full amount of the judgment and costs already obtained against him; and also upon paying the costs of this application on or before 15th July, 1907: otherwise, that this application be dismissed with costs.

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MATHERS, J. MAY 2ND, 1907.

CHAMBERS.

DANIELS v. DICKSON.

Parties—Third Party Procedure—Rules 246, 248—Action upon Promissory Note—Defence of Fraud on Part of Payee—Third Party Notice to Payee—Addition of Payee as Defendant—Discretion—Appeal.

Motion by one Helgeson, who was served by the defendants with a third party notice, to set the notice aside, and motion by defendants for an order joining Helgeson as a party to the action.

The action was upon a promissory note made by defendants in favour of Helgeson, and by him indorsed to plaintiff. The main defence was that Helgeson obtained the note by fraud, and that plaintiff was not a holder in due course.

The two motions were argued together before the local Judge at Brandon.

G. R. Coldwell, K.C., for Helgeson.

H. E. Henderson, for defendants.

S. G. McKay, for plaintiff.

CUMBERLAND, LOC. J.:—Our King's Bench Rule 245 and the 4 following Rules, under which these proceedings are taken, were copied almost word for word from the Ontario Rules of 1881, and these in turn were taken, with one or two slight changes, from the English Rules of 1875.

The working of the English Rules "gave rise to great practical difficulties" (see Pollock, B., in Pontifex v. Foord, 12 Q. B. D. 155), and they were changed in 1881, with the result that the procedure became less uncertain and the relief more satisfactory. The change was followed later on in Ontario. We retain the procedure "as it was in the beginning."

The third party notice served on Helgeson was evidently served under Rule 246, but the defendants introduced into it a few words not found in the schedule to that Rule (form 5) and not consistent with the provisions of Rule 248. I mean the words "or if you wish to dispute the claim of the defendants for indemnity against you," which, no doubt, the defendants borrowed from the present Ontario procedure. Rule 248 provides that if the person served with the third party notice "desires to dispute the plaintiff's claim in the action as against the defendant, he must file his statement of defence," etc., and the only penalty for failure to file a defence is that "he shall be deemed to admit the validity of the judgment obtained against such defendant." Here, presumably, the defendants sought to make failure to file a defence on Helgeson's part an admission of their claim of fraud against him, though they did not, it is true, formally introduce the Ontario default provision into clause 4 of their notice. It was not open to the defendants under Rules 246 and 248 to put Helgeson in that position. I might, of course, order the notice to be amended by striking out the objectionable words, but it seems clear to me that it would serve no good purpose to do so. When amended the notice would put Helgeson merely in the position already referred to, that in order to dispute the plaintiff's claim against the defendants he must enter a defence, and that failure to do so would be an admission of the validity of the plaintiff's judgment against the defendants. Now, he does not desire to dispute the plaintiff's claim against the defendants; he expressly asserts in his material filed on these motions that the claim is a good one; indeed, on the question of fraud, the only question in respect of which it is sought to make him a party, he could not, in the nature of things, take any other position. The third party notice provided for in our Rules 246 and 248 is, in short, wholly inapplicable in a case such as the present. It is evidently intended for use when the third party may be supposed to have some ground which

he may be able to urge against the plaintiff's right to recover from the defendants, and the object of giving him notice is that if he fails to come in and urge such ground it will not be open to him afterwards, when the defendant seeks indemnity or contribution or other relief over against him, to say that the plaintiff should not have been permitted to get his judgment against the defendant.

I set the notice aside with costs to Helgeson, payable forthwith after taxation.

The defendants make *their* motion, I understand, under the second part of Rule 245. That Rule, giving it the interpretation that the corresponding Rules received in England and Ontario (see Horwell v. London General Omnibus Co., 2 Ex. D. 365, and the notes to Holmested and Langton, 1st ed., p. 364), provides for two classes of cases: (1) where a defendant is, or claims to be, entitled to contribution or indemnity or any other relief over against any other person, and (2) where from any other cause it is made to appear that a question in the action should be determined between the plaintiff, defendant, and any other person or between any or either of them. Cases of the first class are worked out under Rules 246 and 248, those of the second class under Rule 247. Rule 249 applies to both, I presume.

The contention here, I take it, is this, that the question of whether Helgeson obtained the note by fraud is "a question in the action" which should be determined, not only as between the plaintiff and defendants, but also as between the defendants and Helgeson, and that Helgeson should be added as a party in order that the question may be so determined, and that Helgeson in any future proceedings against him by the defendants may be held bound by the determination. It is not, I presume, suggested that the relief over against Helgeson should be actually worked out in the present action: see a discussion of the scope of the old English Rules in this particular by Mellish, L.J., in Treleaven v. Bray, 45 L. J. Ch. 113.

The present case differs from any case that I have been able to find either in England or Ontario, except possibly one unsatisfactory case in Ontario, which, in one particular, somewhat resembles it. The difference may, perhaps, not furnish ground enough for saying that the case is not covered by the third party procedure, but this much seems clear, there is not at all the same reason for invoking the proce-

dure that there is in the usual case, and I think it unlikely that a case like the present was ever in the contemplation of those who framed the procedure. In the usual case the plaintiff is asserting something against the defendant, and the defendant is denying it. If the plaintiff succeeds, the defendant proposes to ask a third part for relief over, so he says to the third party, "Come in and help me fight this question and be bound by the result."

Take as a sample the case of Jacobs v. Brown, [1884] W. N. 23, where the plaintiff bought from the defendants goods warranted to be of a certain quality, and sued on the warranty. The defendants were allowed to bring in a third party from whom they had bought the goods on a similar warranty, and it was ordered that the third party should be "bound by the decision as to quality."

It is only proper that in such cases this should be allowed, because, if the third party is not called in, the defendant, when a judgment is obtained against him and when he seeks his relief over, will be compelled not merely to prove his right to relief as between him and the third party, but to establish as against the third party the same case that the plaintiff established against himself. In most cases it would be difficult, in some it would probably be impossible, for the defendant to procure the evidence that enabled the plaintiff to succeed, or any evidence that would have a similar result.

In the present case, however, it is quite different. The defendants are not asking the third party to come in and help them contest any point. The decision by which they wish to bind Helgeson is one in their favour, their right to which they hope to prove affirmatively as a part of their defence. The evidence on which that decision will be reached, if reached at all, will be evidence adduced by the defendants themselves, and not, as it is in the ordinary case, adduced by, and perhaps only procurable by, the plaintiff. All that can be said, therefore, is that the defendants will require to adduce at the trial of their action against Helgeson, when it comes on, the same evidence that they adduce at the trial in the present action, or evidence equally capable of establishing Helgeson's fraud.

These reasons, if they are not enough to indicate that the present is a case where the third party procedure was never intended to apply, are at any rate grounds for declining to invoke it, if it is not clear that it can be done without

prejudicing the plaintiff or hampering the third party in his defence against the charge of fraud.

I think the addition of Helgeson cannot help prejudicing the plaintiff; it must certainly do so to the extent at least of delaying the determination of his action. He is anxious to proceed, and proposes to set the case down for trial at the May sittings. With Helgeson a party this will be impossible. To begin with, Helgeson lives in the province of Saskatchewan, and, following analogous practice, he should be allowed the usual time for putting in his defence—4 weeks. The proceeding is, of course, just as important from his point of view as if he were being sued by the defendants, and the consequences just as serious, and he would have to be permitted to defend himself as fully as if that were the case. All the ordinary steps would have to be open to him of obtaining production and other discovery before the hearing, and at the hearing he would be entitled to a free hand in calling witnesses for himself and in cross-examining those of the defendants. These would be necessary results of bringing the third party in; other delays might not unnaturally be expected to arise as well. For instance, if for any of the ordinary reasons Helgeson should find that some of his witnesses could not be procured, or that he was otherwise unprepared when the plaintiff proposed to go to trial, he would be entitled to a postponement just as much as if the suit were his own.

Then, too, it might well happen that before this action came on for trial the defendants might see that, though they expected to succeed in proving fraud on Helgeson's part, they would be unable to prevent it being shewn that the plaintiff was a holder in due course; examining for discovery in the usual course might shew them that. Even if not so at that stage, it might be that early in the trial it would become evident. What then? Instead of conceding the plaintiff's position and allowing him to get the verdict he was entitled to, the defendants would, in the nature of things, go on and contest the question of fraud to the bitter end because they wished to get a finding in their favour on that question that they could rely on in their future action against Helgeson. The result would be that a contest which might be ended without coming to trial, or shortly after the trial had been entered upon, would drag on to the prejudice of the plaintiff.

It must not be forgotten that there is only one contingency in which the defendants can reap any advantage from bringing Helgeson in, that is, the contingency of their proving fraud on his part, but where it nevertheless appears that the plaintiff is a holder in due course. If the plaintiff is not a holder in due course, the defendants will succeed at once against him, and will not require to proceed against Helgeson for relief over. The case, therefore, so far as this motion is concerned, should really be considered as if the plaintiff were admittedly a holder in due course, and so it seems to me there are specially strong reasons why nothing should be done that would prejudice him.

Apart altogether from our Rule 250, and in England, where they had no such Rule, it was always the practice to refuse a notice to a third party when the plaintiff would be, or would be likely to be, prejudiced. In Bower v. Hartley, 1 Q. B. D. 656, Mellish, L.J., says: "This power is a discretionary one, and, in the exercise of its discretion, the Court ought to consider whether the plaintiff's interests will be prejudiced or affected and if the plaintiff will be prejudiced or delayed, the power ought not to be exercised." And in the same case at p. 657, Baggallay, L.J., says: "I was not much impressed with the argument on behalf of (the third parties) that they would be prejudiced by the proposed order, but I think there is at any rate considerable doubt whether the plaintiff would not be prejudiced by it. In such a case the order ought not to be made."

In the kind of case in which Courts are in the habit of bringing in third parties it is possible to protect the plaintiff against delay or other prejudice without injury to the defendant or the third party. In such cases the third party is only called in to oppose a claim which the defendant himself is interested in opposing, and he rarely need more than the right to cross-examine the plaintiff's witnesses himself. The plaintiff would be but little prejudiced by bringing in a third party under those circumstances.

Here, as I have pointed out, the plaintiff could not be protected without improperly hampering the third party.

I do not think the case one where permission should be given to add Helgeson as a party; and I dismiss the motion.

As I gave Helgeson costs on his own motion, argued at the same time, I give him no costs of this. The plaintiff's costs of this motion will be costs to him if he succeeds.

From the above decision an appeal was taken and argued in Chambers before MATHERS, J.

J. S. Hough, K.C., for defendants.

H. A. Burbidge, for plaintiff.

I. Pitblado, for Helgeson.

MATHERS, J.:—Such cases as Bower v. Hartley, 1 Q. B. D. 652, and others, sufficiently shew that the order made in this case is discretionary. While I am not prepared to hold that there is not power to make the order asked for, I do not think I should interfere with the discretion exercised by the local Judge. I dismiss the appeal with costs, payable to the third party after taxation, and in the cause to the plaintiff in any event.

MANITOBA.

MACDONALD, J. JUNE 4TH, 1907.

TRIAL.

DYCK v. GRAENING.

Chattel Mortgage — Validity—Affidavit of Bona Fides — Affirmation—Jurat—Mistake.

Action for the conversion of a pair of mules.

H. S. Lennox, for plaintiff.

A. W. Bowen, for defendants.

MACDONALD, J.:—Jacob Graening, the father of the defendant Graening, was for some time prior to 12th December, 1905, the owner of the mules, and had mortgaged them with other chattels to one McTavish to secure an indebtedness due by him to McTavish. When this mortgage fell due, Jacob Graening, the mortgagor, was unable to pay it, and McTavish seized the goods, at the same time instructing his bailiff not to sell, and saying that he would endeavour to get the sons of the mortgagor, of whom the defendant Graening is one, to come to the father's assistance. The two sons, the

defendant Jacob J. Graening and John S. Graening, arranged with McTavish to extend the time of payment under his chattel mortgage, and joined with their father Jacob Graening in a promissory note for the amount due under the chattel mortgage. The father was at the same time indebted to the sons in amounts which, with the amount of the chattel mortgage to McTavish, made a total indebtedness of about $800. To secure this total indebtedness the father executed a chattel mortgage to the sons upon his goods and chattels, including the mules in question.

On 19th October, 1906, the father, without the knowledge or consent of the sons, the mortgagees, traded the mules with the plaintiff for a team of horses and a set of harness. Shortly afterwards the defendant Jacob J. Graening and John S. Graening called upon the plaintiff and demanded the mules and advised him of their chattel mortgage against them, and shewed him their mortgage and offered him back his horses which he had exchanged with their father and which they had with them, but plaintiff refused to give up the mules, and on 9th January, 1907, defendant Jacob J. Graening, with the approval of his co-mortgagee, executed a warrant to his co-defendant, under which the mules in question were seized and taken out of the possession of the plaintiff.

The plaintiff brings this action for the conversion of the mules and claims damages to the extent of $500.

The defendants justify the taking of the mules under the chattel mortgage and warrant referred to, which chattel mortgage the plaintiff attacks, and claims that as against him the same is invalid and of no effect by reason of non-compliance with the Chattel Mortgage Act.

The objections raised to the validity of the chattel mortgage are the following:—

1. That the affidavit of bona fides purports to be the joint affidavit of two mortgagees, and the jurat is imperfect in not shewing that they were severally sworn.

2. That the occupation of the mortgagees is omitted in the affidavit of bona fides.

3. That the affidavit of bona fides is imperfect by reason of the allegation of the mortgagees "that I am duly authorized agent in this matter of J. Graening, the mortgagee," &c.

4. That the affidavit was not sworn to as stated in the jurat, the deponents having affirmed, and that in consequence the form of jurat is imperfect.

I cannot give effect to any of these objections.

The conveyancer who made out the chattel mortgage evidently did not know his business and did not understand the form of the affidavit of bona fides; the fact, however, of the jurat not shewing that they were severally sworn has been held to be not fatal: Moyer v. Davidson, 7 C. P. 521; and the adding of the words "that I am duly authorized agent," &c., is apparently a mistake and must be entirely stricken out to make the affidavit consistent in itself.

The adding of the occupations of the mortgagees is not required by our Act, and they are sufficiently identified as being the mortgagees: Brodie v. Ruttan, 16 U. C. R. 210.

That the affidavit was not sworn to, but that instead the mortgagees affirmed, is not a fatal objection, as by the Interpretation Act the expressions "swear" and "sworn" shall respectively include "affirm solemnly," "affirmed solemnly."

The action must be dismissed with costs.

MANITOBA.

MATHERS, J. JUNE 4TH, 1907.

TRIAL.

FINKELSTEIN v. LOCKE.

Mortgage—Power of Sale—Pretended Exercise—Redemption —Contribution—Co-owners—Costs—Tender — Declaration of Interests—Commission.

Action for an account and for redemption and for a declaration that a certain sale of the property in question was void.

S. R. Laidlaw, for plaintiff.

G. A. Elliott and J. E. Robertson, for defendants.

MATHERS, J.:—In March, 1906, the defendant Houghton and one Stephenson purchased a parcel of land in the city of Winnipeg for $1,800, paying $800 cash and assuming a mort-

gage thereon for $1,000. This mortgage was repayable in half yearly instalments of $50 each, with interest at 8 per cent. per annum. The business of acquiring the land was transacted by Stephenson, to whom the defendant Houghton gave his cheque to pay his half of the cash payment. In closing out the transaction with the vendor, certain deductions were made for accrued interest on the mortgage and the proportion of taxes, so that the actual amount paid over by Stephenson was $766.50. At the time the sale took place, the mortgage was in default, and a short time after the purchase notice of sale proceedings was served upon both Houghton and Stephenson, by the mortgagee's solicitors. Houghton then went to Stephenson to get a statement shewing how the matter stood, but failed to get it. He requested Stephenson to pay his half of the arrears under the mortgage and costs of sale proceedings, but Stephenson did not do so. He then consulted his solicitor, the defendant Locke, and under his advice he purchased the mortgage from the mortgagee, and took an assignment of it to the defendant Locke. Under the same advice he proceeded with the sale proceedings and had the land bid in at the sale in the name of the defendant Stephenson. An application was then made in the name of defendant Stephenson for a transmission of title under the Real Property Act, but the District Registrar refused to grant the transmission, on the ground that the posters advertising the sale gave one address at which the sale was to take place and the advertisement published in the newspaper of the same sale gave another address. Steps were then taken by the defendant Locke to re-advertise the property for sale.

Stephenson left the province of Manitoba about the end of November, the first sale having taken place on 1st October. Before leaving, Stephenson appointed, by a general power of attorney, Charles W. St. John, a solicitor, as his attorney. On examining his papers St. John discovered the notice of exercising power of sale, and upon investigation he discovered that the land in question stood in the land titles office in the names of Houghton and Stephenson, subject to the mortgage before mentioned, and that sale proceedings had been taken under the mortgage. He then communicated with the defendant Locke, who informed him that a sale had taken place, but that transmission was refused, giving the reason, and that they were proceeding to re-advertise, and on 29th

December defendant Locke wrote a letter in his firm name to St. John stating that the property had been re-advertised and would be sold on 17th January. On 31st December St. John wrote to Locke for a statement of the arrears under the mortgage under which it was proposed to sell the land, and also a statement of costs. On 7th January he again wrote, and on 8th January Locke replied, giving the arrears as $421.11, and the costs as $75. In that letter Locke placed the arrears of principal at $200, but it is admitted that that was an error, and that the arrears should only be $150.

In the meantime St. John, as attorney for Stephenson, began negotiations with the plaintiff for a sale to him, and he finally sold him (plaintiff) Stephenson's interest in the land for $300. The $300 consisted of a promissory note which Stephenson had given to plaintiff for money lent. The defendant Houghton refused to join in a transfer to plaintiff of Stephenson's undivided half interest, and St. John, under his power of attorney, executed in plaintiff's favour a quit claim deed of all Stephenson's interest in the land. This quit claim deed is dated 14th January, 1907. Plaintiff, and St. John on his behalf, made various attempts to induce defendant Houghton to contribute half of the amount required to pay arrears on the mortgage and prevent sale proceedings, but defendant Houghton asserted that, as the account stood between himself and Stephenson, Stephenson had only contributed $150 towards the purchase of the property, and if his successor now paid the whole amount required to redeem, it would place them about on an even footing, and that any differences could be subsequently adjusted.

On 7th January St. John wrote to defendant Houghton a letter in which he stated that he was informed that the land was to be sold by auction on the 17th instant under the power of sale contained in the mortgage, to which Houghton replied on the 8th, amongst other things stating that he noted the land was advertised for sale on the 17th instant, and he reiterated his position as to the amount he had contributed as against what Stephenson had contributed. A day or two after defendant Houghton wrote the last mentioned letter he discovered, as the fact was, that the sale was to take place on the 15th instant, but he took no steps to correct the mistake that it appeared St. John was labouring under.

In the course of an interview between the plaintiff and Houghton, Houghton admitted that he was the owner of the mortgage, and that the sale proceedings were being prosecuted by him. Having failed to induce the defendant Houghton to contribute anything towards the payment of the arrears under the mortgage, the plaintiff decided to pay the whole arrears himself and prevent a sale.

On 15th January St. John telephoned to defendant Locke that he was that day going to make a tender of the amount due under the mortgage. He was then informed by Locke that he was too late, as the sale had taken place that morning. He expressed great surprise at this, as Mr. Locke by his letter had informed him it was the 17th. In the afternoon, the plaintiff and St. John went to Mr. Locke's office and tendered him the sum of $325.45. This sum Mr. Locke refused to accept, and stated that he intended to stand by the sale that had been made that morning to the defendant Stephenson for $1,185—just about enough to clear the mortgage.

Prior to the receipt of the notice of sale, the defendant Houghton and Stephenson had entered into an agreement for the sale of the land in question to one Askin for the sum of $2,700, payable at the rate of $40 per month, and all payments made under that agreement have been made to defendant Houghton.

This action is brought for an account of the moneys received by defendant Houghton, that the sale to defendant Stephenson may be declared null and void, and for a declaration that the plaintiff is entitled to redeem the mortgage by payment of one-half the arrears thereunder, and that the respective interests of the defendant Houghton and the plaintiff may be stated, and that the defendant Houghton may be ordered to contribute one-half of the moneys required to redeem, and for damages against the defendant Locke, and further relief.

The defendant Houghton by his statement of defence admits that the sale proceedings continued by him were so continued for the purpose of having the title to the land vested in himself, but states that, notwithstanding the sale, he has always been ready and willing to allow Stephenson, or any person lawfully claiming title under him, a one-half interest or share in the lands "upon payment by him or them of the full one-half cost of the said land to the defendant,

and his costs incurred in protecting the said land and procuring the title therefor through such mortgage sale proceedings, which cost became necessary wholly on account of the failure of the said Stephenson to perform his part as joint purchaser of the said lands with the defendant." It was admitted by the plaintiff's counsel at the trial that he understood the expression "full one-half cost of the said lands to the defendant," in the 5th paragraph of the defendant Houghton's statement of defence, to mean the cost of procuring an assignment of the mortgage only, and that it did not refer to the amount contributed by him to the original purchase of the property.

The defendants Locke and Stephenson deny all charges of fraud and fraudulent dealing, and assert that they never had any interest in the land excepting as set forth in the statement of the defendant Houghton.

It seems to me beyond controversy that both of the pretended sales under the power of sale were and are utterly void, and that as against the plaintiff neither of them can be allowed to stand even as an abortive sale; the first, on the ground that the address at which the sale was to have taken place was wrongly stated in the newspaper advertisement and the second on the special ground that the mortgagee misinformed the plaintiff's solicitor as to the date of the sale, and that both sales are void on the ground that they were conducted with the avowed purpose and intention of the defendant Houghton himself becoming the purchaser through the medium of a trustee. I do not believe that the defendant Locke intended to mislead the plaintiff's solicitor or that he deliberately misstated the date of the sale. I unreservedly accept his statement that it was by pure inadvertence. I accept also the defendant Houghton's statement that when he, in his letter of 8th January to St. John, referred to the sale as being advertised for 17th January, he was merely adopting the date as stated in Mr. St. John's letter to him, and at that time he believed that to be the date. I think, however, he ought, when he discovered a day or two afterwards that that date was not the date of the sale, to have drawn St. John's attention to it.

It appears that the poster advertising the first sale was not sent to Stephenson, although he was at that time in the city. The poster advertising the second sale was not sent to St. John, although it was well known by both the defendant

Houghton and the defendant Locke that he then represented Stephenson. The failure to send these notices to Stephenson or to his attorney St. John, and the failure to correct the mistake under which St. John was labouring as to the date of the sale, may have been due to a lack of thought, but it gives rise to a suspicion that there was a studied attempt to keep from Stephenson and St. John knowledge of the particulars of the sale proceedings. But, whether the failure to send these advertisements arose from design or from inadvertence, such failure, when coupled with Mr. Locke's unfortunate mistake when advising St. John as to the date of sale, did mislead St. John.

No attempt was made by counsel for defendants at the trial to maintain the legality of either sale, and he freely admitted that both were, as against the plaintiff, utterly void. It does not seem to me, therefore, that the defendants can be allowed the costs of either sale proceeding.

The only other question is as to whether the plaintiff can be permitted to redeem on paying his proper proportion of the arrears under the mortgage, or whether he must now pay one-half the amount which the defendant Houghton paid in order to acquire the mortgage. By Stephenson's refusal to contribute his half of the arrears, the defendant Houghton was face to face with the alternative of having to contribute the whole of the arrears and trust to recovering from Stephenson his portion, or to permit the sale to proceed and buy it in, as he had a right to do, when sold, or to pay the whole mortgage off and take an assignment to himself. I think the course he pursued in taking the assignment was a reasonable course, and one that protected himself probably more fully than any other course, with less expense. When he took it, however, he became the mortgagee, and, as long as he was mortgagee and the mortgage remained unforeclosed, the person entitled to redeem had a right to pay the arrears only. St. John tendered the whole amount of the arrears. As his co-owner owned the mortgage, he was only obliged to tender half. I think that was sufficient to prevent a sale. It does not appear to me that I have any power to take away from the plaintiff the right which he has of now redeeming, and tack to it the condition asked by the defendant Houghton.

There will be judgment declaring both of the pretended sales under the power of sale in the mortgage null and void; that the plaintiff is entitled to an undivided one-half interest

in the property in question; and that the defendant Houghton do join in a transfer for the purpose of vesting such interest in him.

The defendant Houghton claims the right to charge a commission on the sale to Larkin. It was agreed between the parties that whoever made a sale should be entitled to the usual commission. I think he is entitled to make this charge.

He also claims the right to charge for services in visiting the property and collecting rents, supervising repairs, etc. I do not think he was entitled to make those charges, as there was no agreement to that effect between him and Stephenson.

In the event of the parties not agreeing as to the amount payable by the plaintiff, it will be referred to the Master to take account of the moneys received and paid by the defendant Houghton and of the moneys received and paid out by the plaintiff or his predecessor in title and to ascertain the amount that should properly be paid by each in order to pay the arrears due under the mortgage.

The plaintiff is entitled to the costs of suit, which costs may be set off pro tanto against the amount found to be due from the plaintiff as his proportion of the arrears under the mortgage.

Further directions and costs of reference reserved.

MANITOBA.

JUNE 10TH, 1907.

COURT OF APPEAL.

SMITH v. AMERICAN-ABELL ENGINE AND THRESHER CO.

Real Property Act—Caveat—Charge on Land—Validity — Lien Notes Act—Construction of sec. 4.

Apeal by plaintiff from judgment of MATHERS, J., 5 W. L. R. 329, dismissing the action.

The appeal was heard by RICHARDS, PERDUE, and PHIPPEN, JJA.

J. A. M. Aikins, K.C., and C. P. Fullerton, for plaintiff.
A. B. Hudson, for defendants.

PERDUE, J.A.:—In 1902 one Harvey Fox, then owner of the land in question in this action, gave to defendants an order for a threshing machine and engine, the price to be $3,700, payable by instalments extending over a period of 3 years. These payments were secured by promissory notes. Fox also gave to defendants, at the same time, a separate document under his hand and seal, whereby he purported to charge and create a lien upon the land in favour of defendants for $3,700, payable in instalments agreeing in amount and time of payment with those specified in the order. The machinery was delivered by defendants. Defendants filed a caveat in the land titles office against the land, claiming a lien or charge for the above-mentioned sum. A copy of the document creating the lien was attached to the caveat. The land was afterwards transferred to one Long, and by him to the plaintiff. Both certificates of title, to Long and plaintiff respectively, were issued subject to the caveat. The present action was brought to have it declared that the caveat and registration of it were null and void as against the plaintiff, on the ground that the caveat referred to, or was founded upon, an instrument which was an order for chattels, and consequently infringed the Lien Notes Act, R. S. M. 1902 ch. 99, sec. 4.

Section 4 of the Act prohibits the registration in any registry office, or land titles office, of a lien note, hire receipt, order for chattels, or document containing, as a portion thereof, or having annexed thereto or indorsed thereon, any order, contract, or agreement for the purchase or delivery of any chattel or chattels. It further provides that no caveat shall be registered in any land titles office which has annexed thereto or indorsed thereon, or which refers to, or is founded upon, any instrument or document or part thereof, the registration of which is prohibited by the section.

The first part of the section refers to and prohibits the registration of a document of the class described where the land is under the old system. The second part deals with the lands under the new system, and forbids the filing of a caveat founded upon a document the registration of which has been prohibited by the first part of the section.

The provision was first introduced by 56 Vict. ch. 17. It was aimed at and framed to suppress a practice which widely prevailed amongst implement dealers of inducing farmers to purchase machinery on credit, taking from them written orders or agreements containing a clause which made the purchase money a charge or lien upon their lands. The intention of the Act was to prevent titles to land from being incumbered by the registration of such documents. It often happened that a farmer, who had paid for his machinery in full, had neglected to obtain a release of the lien. When he next came to deal with the land, the lien formed a cloud upon his title, and it was often difficult and expensive to procure the necessary release, when the manufacturers lived in another province or in a foreign country, or had gone out of business. Farmers were often induced to sign such orders or agreements in ignorance of the fact that they were creating liens on their farms. The Act was aimed at suppressing the registration of the documents so as to keep the titles clear. It did not declare the contract created by such a document void as between the original parties to it, but took away from the party in whose favour the lien was created any benefit or protection he might seek to derive from the registration of the document, either by way of establishing his priority, or by fixing other persons with notice of his claim. This purpose clearly appears from secs. 7 and 8 of the Act.

We must now consider whether the documents upon which the caveat complained of is founded, falls within the provisions of the Act. This document contains nothing whatever relating to the purchase or delivery of chattels. It simply declares a lien or charge in favour of defendants upon the land in question for $3,700, to be paid as stated, and a provision that if notes should be given they should not be a satisfaction of the lien or charge. Nothing is said in the document as to how the indebtedness of $3,700 arose. It might have been for money advanced so far as anything appears from the writing. But the plaintiff contends that the document was given as part of the transaction between Fox and defendants, whereby he purchased the machinery from them, and that the portion of the agreement creating the lien on the land was put on a separate paper merely for the purpose of evading the Act.

There is no doubt that the statute in question derogates from the general right of all persons to use the registry offices of the province for the purpose of registering documents creating in their favour a claim upon, or interest in, lands in Manitoba. The statute is also retroactive in effect, and interferes with contractual rights. It must, therefore, be construed with some degree of strictness. We must take the ordinary meaning of the words used in sec. 4 and not give to them any ulterior meaning or effect. This section, taken in its obvious meaning, prohibits the registration of agreements for the purchase of chattels. It also prohibits the registration of a caveat founded upon such an agreement. The document creating the lien and referred to in the caveat attacked, contains no reference to any order, contract, or agreement, for the purchase of a chattel or chattels. It is true that the lien was created for the purpose of securing payment of the purchase money due to the vendor under a separate contract for the sale of chattels, but the Act does not forbid this. The contract between Fox and defendants provided for the giving of "notes on approved security." If, then, Fox had executed an ordinary mortgage on his land to secure payment of the notes, could it be held that the statute prohibited the registration of it? If the statute does not apply to a mortgage executed as security for the payments, I cannot see how it applies to a document creating a lien, given to effect exactly the same purpose.

It was argued that the second portion of sec. 4, referring to caveats, has a more extended operation than the first part. I cannot agree with this contention. The first part of the section prohibited the registration of the documents referred to. The second part applied this prohibition to lands under the operation of the Real Property Act, and forbade the registration of a caveat founded on a document the registration of which had been prohibited by the first part of the section.

Section 5 of the Act makes it the duty of registrars and district registrars to refuse to receive any of the documents the registration of which is forbidden. Unless the document itself shews that it falls within that class, it would be impossible for the officer to safely refuse it. This, in my view, shews convincingly that the legislature intended the provisions in question to apply only to documents shewing on their face, or by something indorsed, or something annexed, that they

belonged to the class from which the benefit of registration was to be withheld.

I must say that the provisions of the Act are very loosely framed and seem to invite evasion, unless, indeed, the object of the legislature was to prevent the concealment of a charge upon land in an agreement for the purchase of chattels. Where a farmer is called upon to sign a second document, which, in plain and simple language, creates a charge upon his farm to secure payment of chattels he has bought, it may be that the legislature felt that, in such circumstances, it must permit him to exercise his own judgment and common sense, and that its protection should not be extended to such a case.

I think the plaintiff has failed to shew a ground for setting aside the caveat, and the appeal should be dismissed with costs.

PHIPPEN, J.A.:—In view of the very general practice prevailing amongst manufacturers, whereby payments maturing under contracts for the conditional sale of goods have been secured by separate charges on land registered against the property of the purchaser, the question raised in this action is of much practical importance.

One Fox, from whom the plaintiff claims title by registered transfer, executed a charge on the lands mentioned in the pleadings, securing to the defendant company payment of an indebtedness arising in connection with a sale by the company to Fox of certain farm implements, the title to which was not to pass until the purchase money was paid. The charge the registration of which is now impeached was executed in the form of a separate document, containing no reference to any of the matters mentioned in sec. 4 of the Lien Notes Act. The plaintiff now seeks to have it declared that, as against him, the charge is void under the provisions of ch. 99, R. S. M. 1902, and asks that its registration be vacated.

Section 4 is as follows:—"On and after the 11th day of March, in the year 1893, no lien notes, hire receipts, orders for chattels, or documents or instruments containing as a portion thereof, or having annexed thereto, or indorsed thereon, any order, contract, or agreement for the purchase or delivery of any chattel or chattels, could lawfully be, and none of the same shall hereafter be, registered in any registry office or

land titles office in the province of Manitoba; and no caveat shall be registered or filed in any land titles office which has annexed thereto or indorsed thereon, or which refers to, or is founded upon, any instrument or document, or part thereof, the registration of which is prohibited by this section; anything contained in any statute of the province of Manitoba to the contrary notwithstanding."

It will be noticed that the documents registration of which is forbidden are those which, from their nature, must contain a reference to the conditional sale of goods, or which, in themselves, or by indorsement, or by annexed agreement, make plain reference thereto. This is not extended by that portion of the section dealing with caveats.

Giving the language of the section its natural meaning, it would appear to refer only to those documents which on their face mention, or which have annexed thereto, a contract relating to the purchase of goods.

This construction is borne out by a consideration of the subsequent sections of the Act.

Section 5 enacts that it shall be the duty of the registrar to refuse to receive any of the prohibited documents. How is he to determine what he should receive and what refuse, unless the objection is apparent from the document?

Section 6 says that, notwithstanding the foregoing provisions, "if by inadvertence, accident, mistake, or the non-performance of duty on the part of the registrar," any such document be registered, the registration shall be void. Inadvertence, accident, mistake, or breach of duty would hardly apply to, is scarcely apt language to describe, the receipt and registration of a document which does not appear to contravene the provisions of the Act.

Section 7 declares that every document the registration of which was or is prohibited shall be, in so far as the same purported or purports to affect land, absolutely null and void as against any person claiming an interest or estate in lands under a registered instrument. Again, the statute refers to what the instrument purports to be, and not to what in truth it is. The lien, while void as against registered purchasers, is valid as between the actual contracting parties.

The legislation was originally enacted as ch. 17 of 50 Vict. (1893). This Act is intituled "An Act prohibiting the registration of Lien Notes, Hire Receipts, and Orders for Chattels in Registry and Land Titles Offices."

Sections 7 and 8 of ch. 99, R. S. M. 1902, did not form part of the original Act. These sections were introduced by way of amendment in 1894 by 57 Vict. ch. 14. As the Act now stands, it is retroactive. Lien notes charging lands taken prior to March, 1894, were good as against the world, subject only to the provisions of the Registry Act. By the Act of 1894, except so far as they had then been legally registered, they are declared void, except as between the original parties.

I do not think the Court should give what has recently been termed a "benevolent" construction to retroactive legislation working a forfeiture. If the legislature intended to forfeit vested rights by allowing an owner, who has, in good faith and within the law, charged a debt upon his land, to defeat the charge, the intention should appear in plain language.

Apart from this, however, looking at the Act as a whole, I have no doubt it is directed to the form of the instrument and not to the substance of the contract. As the charge impeached in this action does not come within the plain meaning of the language, it is not void as against the plaintiff, neither was its registration unlawful.

The appeal should be dismissed with costs.

RICHARDS, J.A., concurred.

MANITOBA

PERDUE, J.A. JUNE 10TH, 1907.

COURT OF APPEAL.

ANDREWS v. MOODIE.

Costs—Settlement of Action for Alimony—Agreement of Husband to Pay Wife's Costs—Action by Wife's Solicitors against Husband for Costs—Consideration—Trust—Equitable Assignment—Amendment.

County Court appeal.

This was an action to recover a solicitors' bill of costs, amounting to $50, incurred in connection with an alimony

suit brought against the defendant by his wife. Plaintiffs were the firm of solicitors who acted for the defendant's wife in bringing the suit. A conference was arranged by the plaintiffs at which the defendant and his wife were present, and it was there agreed that husband and wife should be reconciled and the alimony suit dropped. Mr. Andrews, a member of the plaintiffs' firm, who was present at the conference between the parties, and who assisted in arranging the terms, stated that the costs of the plaintiff in the alimony suit were fixed at $50, and this amount the defendant, according to Mr. Andrews's evidence, agreed to pay to him. The defendant failed to pay this amount, and the present suit was brought in a County Court in the name of the solicitors to enforce payment. At the trial, WALKER, Co. C.J., entered a verdict for plaintiffs, and from this verdict the present appeal was brought.

The defences raised by the dispute note were: (1) never indebted; (2) duress, undue influence, and that the defendant acted without legal advice.

At the trial the defendant applied for leave to plead the Statute of Frauds, but the Judge refused the application.

H. Phillipps, for defendant.

H. A. Burbidge, for plaintiffs.

PERDUE, J.A.:—At the trial Mr. Andrews stated that the parties, plaintiff and defendant in the alimony suit, came to his office and made a settlement of their difference, one of the terms of which was that the costs of the plaintiff's solicitors were fixed at $50, being a sum less than the amount at which they would have been taxed, and that the defendant agreed to pay these costs to the present plaintiffs.

The defendant positively denied that he ever agreed to pay his wife's costs. His evidence is, in fact, a complete denial of the evidence given by Mr. Andrews. No other witnesses were examined on behalf of either plaintiff or defendant. The County Court Judge believed the evidence offered on behalf of plaintiffs, and, as he had the fullest opportunity of estimating its value, I do not think it would be proper for me to interfere with his decision upon the question of fact.

The defendant's counsel on the appeal urged that no consideration passed from the present plaintiffs to the defendant to support any promise on the part of the defendant to pay the moneys sued for to the plaintiffs; that the contract, as

proved by the plaintiffs, was one between the defendant and his wife by which he agreed to pay her costs, and, if there was default in carrying out that contract, she alone could maintain an action against him, and that the plaintiffs were strangers to the contract. In support of this I was referred to Leake on Contracts, p. 292; Gandy v. Gandy, 30 Ch. D. 57; Gillies v. Commercial Bank of Manitoba, 10 Man. L. R. 460.

It appears to me that the evidence does not shew that the $50 was to be paid to the defendant's wife as trustee for her solicitors, the present plaintiffs, and they cannot, therefore, sue as cestuis que trust, claiming a beneficial interest under an agreement. If, A being liable to B, C agrees with A to pay B, that does not make B a cestui que trust: In re Empress Engineering Co., 16 Ch. D. 125. The plaintiffs therefore cannot maintain an action as beneficiaries entitled to sue under a contract declaring a trust in their favour.

The position, however, in the present case is this: a wife is suing her husband for alimony; the parties agree, in the presence of the wife's solicitor, to be reconciled, and they are then and there reconciled to each other; the suit is settled; husband and wife resume living together; and, as a part of the settlement, the husband agrees to pay directly to his wife's solicitors her costs of the action. This is assented to by the wife and by the solicitor, all 3 being present together. The arrangement, then, is that the husband agrees to pay the wife's costs directly to the solicitor, pursuant to her direction, and in consideration of the settlement of the suit and the resumption of the relations of husband and wife. It appears to me that this was an equitable assignment of the wife's claim for costs to the solicitors, which was assented to by the 3 parties, and which enables the plaintiffs to maintain an action in their own names for the costs in question.

The plaintiffs have not, as appears by the particulars, set up a claim by way of equitable assignment. The form in which the action was brought appears in the particulars of claim as follows: "The plaintiffs claim from the defendant the sum of $50, being the amount of the costs of suit of defendant's wife against the defendant which the defendant agreed to pay as one of the terms of settlement between the said parties." It does not appear to me that the plaintiffs could recover in an action in the form in which it is alleged in the particulars. The plaintiffs would be in such an action

strangers to the contract. As the evidence, however, is sufficient to support an action on the part of the plaintiffs upon an equitable assignment of the money which the defendant agreed to pay, the particulars may be amended so as to include such a claim.

The appeal will therefore be dismissed without costs.

MANITOBA.

DUBUC, C.J. JUNE 10TH, 1907.

TRIAL.

ADAMS v. McGREEVY.

Mechanics' Liens—Action to Enforce—Time for Commencement—Time when Last Work Done—Evidence of Plaintiff—Extra Work — Estoppel—Contract — Payment for Work and Labour—Completion of Work—Delay—Omissions—Deduction.

On 8th October, 1906, plaintiffs mailed to defendants a tender "to put in a complete job of steam heating" in block 555 and 557 Sargent avenue, Winnipeg. The tender was returned by mail to the plaintiffs marked accepted, signed "McGreevy & Donovan, per J. C. McGreevy." In their tender plaintiffs had offered to furnish the materials and do the work for $660. They claimed to have performed their contract, and brought this action for the amount mentioned. They registered a lis pendens, and claimed a lien on the property.

Defendants filed separate defences; they both denied making the contract, alleged that the work was not done in a workmanlike manner, nor within a reasonable time; that it was never completed; that the action was not brought within the time prescribed by statute for such action; and that, therefore, the plaintiffs were not entitled to any lien on the property in question.

A. Monkman, for plaintiffs.

T. J. Murray, for defendants.

DUBUC, C.J.:—It is contended by defendant Donovan that he was not a partner of McGreevy, and that McGreevy had no authority to sign his name to the contract. He, however, admitted in evidence that the property had been purchased by McGreevy and himself jointly, and that he had put in about one-third of the consideration. This is sufficient, I think, to make him a partner in the ownership of the property. It being so, McGreevy must be presumed to have had authority to sign the name of his co-partner in the contract, and Donovan was properly made a defendant in the action.

At the close of the plaintiffs' case, the defendants' counsel moved for a nonsuit, on the ground that the action was not commenced within 30 days from the completion of the contract as provided for in the Mechanics' and Wage Earners' Lien Act, R. S. M. 1902 ch. 110.

The action was commenced on 21st March, 1907. It is alleged on behalf of plaintiffs that the last work done on the steam heating apparatus was performed on 22nd February, when the bronzing of the pipes and radiator was done. But plaintiff Adams stated repeatedly in his evidence that the bronzing was no part of the contract; that he did the same as extra work, outside of the contract; that in ordinary contracts for putting in steam heating plant the bronzing is not a part of such contract, unless specified in it, and it was not specified in the contract in question. He says that the contract work was completed on the 9th January. One of his witnesses said in rebuttal that he would not consider a job complete without bronzing. But the defendants urging that the plaintiffs' interpretation of their own contract in that respect should be considered the correct one, I am disposed to adopt it. I must, therefore, hold that the action was not commenced within 30 days from the completion of the contract work, and there should be a nonsuit as to that part of the action which claims a lien on the property. The lis pendens should consequently be vacated. The plaintiffs, however, are not debarred from proceeding, as in an ordinary action, for money due under their contract.

The defendants, by urging and taking the stand that, according to plaintiff Adams's interpretation of the contract, the last work done under said contract was performed on 9th January, should be estopped from contending that the bronzing done afterwards was part of the contract. They cannot be allowed to blow hot and cold at the same time.

Other questions to be determined are whether the job was done in a workmanlike manner; whether, apart from the bronzing, the work was completed on 9th January, and whether the work was done within a reasonable time. A good deal of evidence has been given on these differnt points. Considering the different testimonies, and taking the evidence as a whole, I am led to the conclusion that the work was satisfactorily done, and that it should have been accepted as such by the defendants. Because the defendants had to send steam fitters about 24th or 25th April to put the heating plant in proper shape, and the steam fitters found that some automatic valves and other small things were missing, that does not prove that plaintiffs had not put them in previously, particularly when Adams swears positively that they were all in when he left the work on 9th January, and that he operated the heating plant before he left the premises as tenant on 31st January. The building having been left vacant with back door open, for several weeks prior to the repairs being done in April, the automatic valves and other things might very well have been taken away by persons entering into the building by the open door when the building was left vacant.

Some of the pipes and radiators which had been broken by frost had to be repaired also; but, as it appears that there was want of fuel when some of the tenants were in the building, and no fire was kept in the boiler after the tenants had left, I do not see how plaintiffs, after doing their work on the plant, and after they left the building themselves as tenants on 31st January, were bound to keep fire in the building until defendants chose to take charge of it, and how they should be held responsible for the damage caused by frost after they had left.

As by the agreement there was no time limited for completing the work, the plaintiffs were bound to do it within a reasonable time. The acceptance of the tender which constitutes the contract must have been sent to plaintiffs about 20th October. It has been shewn that, if the materials had been there, the work could have been done in about 20 or 21 days. The plaintiffs ordered a particular boiler from the Vulcan Iron Works, in Winnipeg, and they had to send to Guelph, Ontario, for the same. It did not arrive in Winnipeg until 7th or 8th December, when they went to work, and completed the job, apart from the bronzing, on 9th January. They might have obtained a boiler in Winnipeg, and this

would have shortened the time for doing the work; but Adams says he selected that particular boiler because the Guelph people who manufactured it had the reputation of making good boilers. He says he told McGreevy that the order for the boiler had been sent to Guelph, and no objection was raised against it. So, if there was delay on that account, defendants seem to have acquiesced in it. Considering the time they had to wait for that boiler, and for the grate which went astray in transit and came later on, I do not think that the completion of the contract work by 9th January should be considered as not done within a reasonable time.

The defendants contend further that the work was never completed by plaintiffs, because they did not put in floor and ceiling plates around the pipes. These plates were shewn to be worth about 10 cents a piece, and about $4 for the whole. It is true that the contract was an entire one; and substantial performance of such a contract is not sufficient. But the omission to put in those plates must be considered as a trifle, and, under Lucas v. Godwin, 3 Bing. N. C. at p. 744, and Stavers v. Curling, 3 Scott 755, a trifle of that nature should not be held to prevail so as to make the plaintiffs lose the whole consideration of an otherwise performed contract by such trifling omission.

I therefore think the plaintiffs are entitled to recover the amount of their contract, $660, from which, however, should be deducted $40 for the old boiler which they had agreed to take, and 4 months' rent of one of the stores up to 31st January, at $20 a month. Judgment should be entered for $540, with costs.

MANITOBA.

MACDONALD, J. JUNE 10TH, 1907.

TRIAL.

TURNER v. ZAS.

Vendor and Purchaser—Sale of Land—Counterclaim by Purchaser to Rescind—Misrepresentations—Deceit—Damages—Money Lent—Interest—Price of Land—Rebate for Deficiency in Acreage—Costs—Set-off.

Both parties to this action were farmers residing in the municipality of Franklin.

On or about 8th July, 1905, the plaintiff and defendant entered into an agreement for the sale, by the former to the latter, of lots 82 and 84 in the parish of Ste. Agathe for the price of $7,000. Afterwards the plaintiff advanced defendant certain moneys and sold him seed grain and horses, and in the month of February, 1907, both parties called upon Michael Scott, a real estate agent, who had previously drawn the agreement of sale between them, for the purpose, as stated by the plaintiff and corroborated by Scott, of adjusting the outstanding accounts between them and obtaining Scott's assistance in so doing.

The indebtedness of defendant to plaintiff was on this occasion figured by Scott at $773.75, and, as stated by the latter, both parties were satisfied as to the correctness of this amount.

The plaintiff then asked the defendant for security by way of a chattel mortgage, and, after some discussion, defendant refused to give security; and this action, as originally framed, was brought to recover the amount of the indebtedness mentioned.

The defendant delivered a statement of defence denying his indebtedness, and afterwards amended his statement of defence by counterclaiming for work done for plaintiff, board for plaintiff's man and team, and $1.000 for wood which he alleged was taken by plaintiff off his (defendant's) land.

Subsequently defendant amended his counterclaim by charging plaintiff (amongst other things) with fraud, deceit, and misrepresentation in the sale of the farm mentioned and described, and claiming damages and a rescission of the agreement for the sale of the land.

The plaintiff on the trial, and pursuant to notice, amended his statement of claim by charging a further indebtedness against the defendant of $890 for breach of several of the terms of the agreement of sale referred to, and the defendant on the trial amended his statement of defence.

David Forrester and Donald Forrester, for plaintiff.

J. H. Leech and J. W. Wilton, for defendant.

MACDONALD, J.:—The principal issue and the one of the greatest importance is the one raised by the defendant's amended counterclaim, but I shall first deal with the plaintiff's claim.

There is no dispute as to the first item, excepting as to the interest. The defendant admits the advance of the $200, but denies any agreement to pay 8 per cent. interest. The plaintiff swears that interest at that rate was agreed upon, and at the time of the making out of the statement in Scott's office the computation was on the basis of 8 per cent., and the defendant took no objection to it.

I find the plaintiff entitled to the following items as specified in the following paragraphs of his statement of claim:—(2) $243.20; (3) $211.50; (4) $52.70; (5) $214.50; (6) $36.25; (7) $30; (8) $54; (9) $15; (10) $25.

Upon his amended statement of claim, I find the plaintiff entitled to interest on the agreement of sale referred to, as provided for in the said agreement, namely, 6½ per cent. on $7,000 from 1st December, 1905, and compound interest as therein mentioned.

The defendant in his amended statement of defence alleges that if the wheat and oats referred to in paragraphs 4 and 7 of the plaintiff's statement of claim were ever received by the defendant, the same were given to him in lieu of 200 bushels of other grains which the plaintiff was to have left on, and delivered to the defendant with, the farm referred to. The plaintiff on the trial did not remember any agreement by him to leave this or any quantity of oats on the farm, but it appears that, when the statement of defendant's indebtedness was made out in Scott's office, this item was mentioned and claimed by the defendant, and the plaintiff, without acknowledging the defendant's contention, agreed to allow him for these 200 bushels of oats. I think the defendant is entitled to a credit of $70 for this item.

The fifth item is for the purchase price of a team of horses, sold by the plaintiff to the defendant. The latter contends that it was not a sale, but a loan of the horses from the plaintiff to him. This contention is entirely at variance with the actions of the defendant, but, as the defendant has returned the horses, and they are now in the possession of the plaintiff, and the plaintiff is willing to accept them in lieu of the purchase price, the defendant will be allowed credit for the amount charged for this item, namely, $214.50.

I shall now deal with the counterclaim and the charge of fraud therein set forth.

The plaintiff was the owner of the farm in question, and, to his knowledge, it was a very dirty one, being badly in-

fested with couch grass, commonly known in the district as quack grass. The plaintiff and defendant met in the town of Emerson in the month of July, 1905, and the latter says that the plaintiff asked him if he wanted to buy "a good clean farm," to which he says he replied "Yes, if I can get a good clean farm I will buy." The plaintiff then advised him where the farm was and told him to go and see it. The defendant very shortly afterwards drove out and saw the farm. It was then in crop and at a time of year when weeds would be most in evidence. He noticed, growing up in the wheat fields, a peculiar kind of grass which he says upon inquiry the plaintiff told him was timothy, yet he admits he knew timothy and must have known this was not timothy.

The grass he saw was quack grass, and the plaintiff says that at the time of their first meeting about the farm he told the defendant that the farm was a good one, but that there was quack grass in it, and that it would be necessary to get rid of this before good crops could be had; that there was a lot of wood upon it; and that, while putting the farm in a good state of cultivation, which he thought would take about 3 years, he would accept as payment, on the purchase price, 700 cords of wood to be cut off the place during that time.

Immediately, or a very short time after seeing the farm, the parties met and had the agreement of sale executed, and this agreement provides for the delivery of wood as above stated. The agreement of sale was drawn by Michael Scott and witnessed by him, and he says that, at the time, the weediness of the farm was discussed (although he does not remember quack grass being mentioned), and that the wood on the farm was decided upon as the means of payment of instalments of purchase money for the first 3 years, and that the agreement was explained and partly read over by him to defendant.

Scott, who is a man of experience and knowledge of the district, says that quack grass has existed in the Emerson district (where this farm is situate) for some years, and that this is an average farm in that district and worth $25 an acre on ordinary terms of credit. He has known defendant for some time and considers him fairly shrewd in business matters, although unable to read or write.

The defendant bases his defence on the ground that it was represented to him by the plaintiff that the farm was clean and suitable for raising crops of weat, oats, and barley,

and that there was no mention of quack grass at any time leading up to or at the time of the execution of the agreement, and that he did not know what quack grass was, or its effect. Even if he did not know this grass, there is no suggestion that the plaintiff was aware of that fact, and it seems unreasonable that, if the plaintiff made such a representation, he would invite the defendant to inspect the farm at a time when quack grass would be far advanced and most noticeable.

There is, however, a great deal of evidence that the defendant knew what quack grass was, in addition to the evidence of the plaintiff. Gustave Kreutz had a conversation with him and warned him against the farm, that it was full of quack grass, and the defendant said he did not care; there was lots of wood and he would make money out of it. Christopher Link also told him the place was full of quack and weeds, and defendant replied that there was lots of wood and he could make his money out of it. This conversation was a short time after the sale. Defendant lived with William Miller, and they worked together on the Delane farm in 1904. This farm was infested with all kinds of weeds and had quack grass in patches through it, and the defendant helped to drill portions so affected.

Defendant had a conversation with Robert Hamilton at the time he was entering into the agreement with plaintiff, when he was told that the farm had the reputation of being weedy, and defendant said he knew that, but that there was $2,000 worth of wood on it over and above expense of handling. The defendant had a conversation with Robert and Bidwell T. Bullis about 8 days after he bought the farm in question, in which he expressed a knowledge of quack grass.

The evidence leads me to the conclusion that the defendant knew quack grass at the time of his purchase, and that he must have seen it on his first inspection of the farm immediately before the purchase, and I also find that the plaintiff advised him that the farm was affected with it, and that it must be got rid of before the farm would be a good one for the purpose of raising crops of wheat, oats, and barley. There has been, therefore, no fraud or deceit practised by the plaintiff.

The only remaining question to consider is, was there a misrepresentation of a material fact, by the plaintiff to the defendant, entitling the latter to a rescission of the contract.

The plaintiff admits that he understood the defendant wanted a good farm for growing grain, and he maintains that the farm is of such a character, when the quack grass is eradicated, and that the time necessary to accomplish this eradication was discussed and the terms and manner of payments made, in anticipation of that time.

The defendant entered into possession and did some ploughing in the fall of 1905 on land affected with quack grass. He ploughed again in the spring, and says that when seeding he told the plaintiff to try and sell the farm, that he could not work it with the number of horses he had, and could not pay for it. He also says that he asked the plaintiff to take one-half the crop of 1906, and that he would leave the place, but that the plaintiff would not agree to this. He did not at any time claim to have been imposed upon, nor does he ask to be released from his contract otherwise than as stated. On the contrary, after harvesting his crop in 1906, he ploughed the land apparently in preparation for the following year. He admits that his relations with plaintiff up to that time were of the most friendly character, and makes no complaint nor suggests any grievance against him until this action brought.

Although I believe the defendant made a bad bargain, yet I cannot find that it was the result of misrepresentation entitling him to a rescission of the contract, and if there had been misrepresentation he must have known it after his first work upon the farm, and should have taken earlier action to assert his right to a rescission.

At the time of the sale, the plaintiff was of the impression that the land in question consisted of about 300 acres. The defendant says he thought he was getting 281 acres. There is in reality but 271 acres.

The defendant is entitled to a rebate on the purchase price of the farm of 10 acres, figured on the value per acre at which the farm sold.

The defendant claims $150 for ploughing 75 acres of land on the farm described as the Bain farm during the year 1906. The plaintiff contends that this land was leased by him to defendant, and defendant admits that an agreement was entered into by which he was to go on and do the ploughing, and if he wished to lease he had the right to do so, and in the event of his concluding not to lease that he was to be paid for the ploughing; this is denied by the plaintiff, who alleges that the defendant did lease, and that

the ploughing was done for his, the defendant's, own benefit, and I think this contention is the correct one. The plaintiff agrees, however, to allow the defendant for the ploughing, as he has received the benefit of it, and upon the evidence I find the quantity ploughed to be 50 acres, for which I allow the defendant the sum of $100 as a set-off against the plaintiff's claim. The defendant also claims for the conversion by the plaintiff of 10 acres of hay left by him on the lands in question herein, and the defendant admits having taken and used a part of this hay, for which I allow the defendant the sum of $50.

The remainder of the counterclaim, after a careful consideration of the evidence, I must dismiss with costs to the plaintiff, without any right of set-off for costs on the items upon which the defendant succeeds.

MANITOBA.

DUBUC, C.J. JUNE 12TH, 1907.

TRIAL.

SHAW v. BAILEY.

Vendor and Purchaser—Contract for Sale of Land—Unregistered Agreement—Sale and Conveyance by Vendor to Third Person—Notice of Prior Sale—Abstention from Inquiry—Fraud—Failure of Evidence to Establish—Real Property Act—Registry Act—Specific Performance.

Action for specific performance.

H. A. Robson and F. G. Taylor, for plaintiff.

E. Anderson and E. P. Garland, for defendants.

DUBUC, C.J.:—The plaintiff brought his action against defendants Bailey and James for specific performance of an agreement for sale by which James agreed to sell him a certain property in Portage la Prairie. The plaintiff failed to register his agreement.

A few days after, James executed a deed of the same land in favour of defendant Bailey, who had the instrument

registered, and subsequently obtained a certificate of title for the same. The evidence shews that about the time when the negotiations were taking place between James and the plaintiff about the sale of the lands, James had been for some time and was still drinking heavily; that he must have been drunk when he signed the documents produced, and was hardly in a position to transact business. It appears that he was also more or less under the influence of liquor when he executed the deed in favour of Bailey. Besides what was stated by the witnesses who saw him at the time, his signature to the agreement for sale and to the transfer made in favour of the plaintiff appears to be the mere scrawling of a person who has no control of his hand. His signature to the deed given to the defendant a few days later is far also from good penmanship, but, at least, it is legible and shews the letters forming his name.

The principal point raised by the plaintiff's counsel is that Bailey had notice of the prior sale to the plaintiff.

Before purchasing the property Bailey saw Mr. Taylor, plaintiff's solicitor, who told him that James had sold the property to the plaintiff, and that the money had been paid over. But, shortly after, Bailey was informed by Watson, a real estate agent, that the property was not sold; that James had placed it in his hands for sale, and James himself told him that he had not sold the property, that he had signed no instrument in regard to it. Inquiry by his solicitor at the registry office elicited the fact that no instrument executed by James was registered, and that the property still stood in James's name. Bailey then purchased the property, gave his cheque for the price, and had his deed registered. It is true that the plaintiff had also given his cheque to his solicitor for the purchase money, but none of it has yet been paid over to James.

In order to succeed in his action the plaintiff must shew fraud on the part of defendant Bailey. Fraud must be clearly established; it would not be sufficient to infer it.

Bailey was told of the sale to the plaintiff, but no document was shewn to him.

Three things contributed to give him the idea that it was not sold: the information given him by the agent Watson; the positive statement of James himself; and the inquiry at the registry office. By the information received from the plaintiff's solicitors was Bailey bound to inquire further about it?

In Stark v. Stephenson, 7 Man. L. R. 381, it was held by Chief Justice Killam that, in order to bring abstinence from inquiry within the category of actual notice, there must be wilful abstinence and fraudulent determination not to be informed. I cannot find, on the evidence, that such wilful abstinence and fraudulent determination has been established here.

By sec. 91 of the Real Property Act, R. S. M. 1902 ch. 148, it is enacted that no person shall "be affected by notice, direct, implied, or constructive, of any trust or unregistered interest, any rule of law or equity to the contrary notwithstanding, and the knowledge that any trust or unregistered interest is in existence shall not, of itself, be imputed as fraud."

Under such provision and with the facts shewn in the case, defendant Bailey cannot, in my opinion, be considered guilty of fraud.

It being so, and the defendant Bailey being the holder of a certificate of title to, and the registered owner of, the property in question, I do not see, under secs. 71 and 91 of the Real Property Act, and sec. 68 of the Registry Act, that specific performance can be decreed as prayed for herein.

I think the action should be dismissed with costs.

MANITOBA.

DUBUC, C.J. JUNE 12TH, 1907.

TRIAL.

MOORE v. CROSLAND.

Negligence—Horses Running Away—Injury to Person Lawfully on Highway—Liability of Owner of Horses—Extraordinary Occurrence—Absence of Evidence to Shew Want of Proper Care.

Action for damages for personal injuries sustained by plaintiff owing to the alleged negligence of defendant in leaving his horses insufficiently tied, in consequence of which they broke loose and ran away and injured the plaintiff upon the highway.

F. G. Taylor, for plaintiff.

A. Meighen, for defendant.

DUBUC, C.J.:—At the conclusion of the argument I expressed my views on the facts of the case as brought out in the evidence.

It was not disputed that plaintiff's serious injuries were caused by defendant's horses.

The defendant, having to go into a shop, tied his team of horses, or rather one of them, to a telegraph pole, with a leather halter and a hemp rope. The horse who was tied was proved to be a quiet horse. He was suddenly frightened; but the cause of his fright has not been discovered. As described by a witness, he jumped, pulled heavily, plunged, crouched, and in a second effort and pull, an iron ring, by which the rope was attached to the halter, was broken, and both horses ran away. They overtook plaintiff, who was quietly driving in a buggy, threw her down, and she sustained a fracture of the leg.

It was contended on behalf of plaintiff that the halter and rope were old and not of sufficient strength to hold the horses, and that this constituted negligence on the part of defendant.

I stated at the time that the halter and rope had been shewn to be of sufficient strength to hold a horse like the one in question, in ordinary circumstances; that, in my opinion, a man of ordinary prudence could not forsee an extraordinary occurrence such as the one which frightened his horse, and that he could not be expected to provide a stronger halter and rope. I held that, on the evidence before the Court, the accident must be considered to have occurred through fortuitous cause, and not through the negligence of the defendant.

I, however, reserved judgment to look at the authorities cited by plaintiff's counsel.

After carefully reading them, I consider that they rather confirmed the views I expressed at the time.

I must, therefore, find that plaintiff's injury, though greatly to be deplored, was caused by an accident for which the defendant cannot be held legally responsible.

The action should be dismissed.

MANITOBA.

DUBUC, C.J. JUNE 12TH, 1907.

TRIAL.

PEDLAR v. CANADIAN NORTHERN R. W. CO.

Railway—Destruction of Horses by Engine at Crossing—Negligence—Contributory Negligence—Railway Act, 1903, sec. 224—Conflicting Evidence as to Blowing Whistle—Failure to Ring Bell—Neglect of Persons in Charge of Horses to Look out for Train—Occurrence within City Limits—Exception in Statute—Failure of Evidence to Negative.

Action to recover the value of a team of horses and for damage done to a waggon and harness.

C. P. Fullerton, for plaintiff.

O. H. Clark, K.C., for defendants.

DUBUC, C.J.:—The plaintiff's team of horses, while proceeding along Cambridge street, within the limits of the city of Winnipeg, and crossing the railway track of the defendants, was struck by one of the defendants' passing engines. The two horses were killed and the waggon and harness injured.

The question is whether the accident was caused by the negligence of the defendants, and whether the plaintiff's man driving the horses was guilty of such contributory negligence as to disentitle the plaintiff to recover.

By sec. 224 of the Railway Act of 1903 it is enacted that, "when any train is approaching a highway crossing at rail level (except within the limits of cities or towns, where the municipal authority may pass by-laws prohibiting the same), the engine whistle shall be sounded at least 80 rods before reaching such crossing, and then the bell shall be rung continuously until the engine has crossed such highway."

It is provided further that the railway company shall be liable for all damage sustained by any person by reason of such neglect.

As to the blowing of the whistle on the occasion in question, the evidence is conflicting.

Richard Hughes, who was driving the team which was killed, and G. H. Pedlar, who was there at the time of the accident, swear that they did not hear the whistle, and that, if it had been sounded, they would have heard it.

Charles B. Lilley, the driver in charge of the locomotive, and Harry McFee, the fireman, state that the whistle was blown.

Whether the whistle was blown and not heard by Pedlar and Hughes, or whether 2 of the 4 witnesses are not telling the truth, I am not prepared to find. The negligence or non-negligence of the defendants may be determined without deciding that point.

It was the duty of the defendants to ring the bell, and it was not shewn or suggested that the bell was rung. So, on that point, under the provision of the statute above referred to, the defendants must be held guilty of negligence.

It is contended on behalf of the defendants that it has not been shewn that the crossing in question was on a highway, but I think this is sufficiently established by the evidence of Bemister, Dominion and provincial land surveyor.

The defence raised the question of contributory negligence on the part of the plaintiff's men, in not looking out on each side of the crossing to see whether a train was coming. The evidence on that point is contradictory. The plaintiff's men say that they looked out; that there was some obstruction which prevented them from seeing the engine coming; and that they did not hear the rumble of the locomotive.

On the other hand, it is shewn by the defendants' witnesses that 50 feet on the north side of the crossing whence the plaintiff's men were coming, the headlight of the engine could have been seen between 500 or 600 feet from the crossing.

If the plaintiff's men had looked out and stopped at that distance from the crossing, the accident would not have taken place.

If it was so—and I incline to believe that it was—it should be held under Winchester v. Great Western R. W. Co., 18 C. P. 250, Johnston v. Northern R. W. Co., 34 U. C. R. 432, Weir v. Canadian Pacific R. W. Co., 16 A. R. 100, and other cases in the same line, that the plaintiff's men were guilty of contributory negligence, and that, under such circumstances, although there may have been negligence on

the part of the defendants, the plaintiff would not be entitled to recover.

But there is another point of some importance in this case. As to the failure to ring the bell of the engine in approaching a highway crossing, there is, in sec. 224 of the Railway Act, an exception which has to be considered. The section says that the whistle should be sounded and the bell should be rung, "except within the limits of cities or towns, where the municipal authority may pass by-laws prohibiting the same."

The point was raised on the argument that there is nothing in the evidence to negative that exception, and to shew that there is no by-law of the city of Winnipeg prohibiting the same.

The plaintiff has not alleged in his statement of claim, nor proven, that there is no such by-law in existence.

If there were such a by-law the defendants would not be bound to blow the whistle or ring the bell, and there would be no negligence on their part in not doing so.

If the plaintiff had negatived the exception even only in the evidence, the statement of claim might have been amended to allow him to succeed. But, having failed to do so, I think he cannot recover.

I am, therefore, of opinion that the action should be dismissed with costs.

MANITOBA.

DUBUC, C.J. JUNE 15TH, 1907.

TRIAL.

HEATH v. SANFORD.

Vendor and Purchaser—Contract for Sale of Land—Specific Performance—Authority of Vendor's Husband as Agent—Land not Described—Unsatisfactory Evidence of Acceptance of Offer—Option—Absence of Seal—No Consideration.

Action for specific performance of a contract for the sale to plaintiff of certain land.

A. B. Hudson and E. A. McPherson, for plaintiff.

E. Anderson and A. C. Williams, for defendant.

DUBUC, C.J.:—In March, 1906, Isabel Sanford, the defendant, who lives at Portage la Prairie, asked the plaintiff, a real estate agent, to sell for her a certain lot of land which she mentioned to him. In June following the plaintiff went to her and asked her for an option on the property at $6 a foot frontage, or $300 for the 50 feet frontage. She said that her husband, W. J. Sanford, would have to be consulted, and told plaintiff that he might see the husband at the Home for Incurables. The plaintiff went to see him. W. J. Sanford refused at first to give an option. After telling him that he had in view an American as intending purchaser, and stating that Americans were particular about obtaining written options, the plaintiff prevailed upon W. J. Sanford to give him an option of 7 days. The document, which was written by the plaintiff, reads as follows:—

"Portage la Prairie, June 14, 1906. I hereby agree to sell to Charles Heath or his assigns the south 50 feet of two lots on corner of Alfred and Main streets, for price or sum of $300, clear of all commission, and to give him 7 days to accept the sale or refuse same. W. J. Sanford."

The plaintiff says that before the expiration of the 7 days he handed to the defendant a letter, addressed to her husband, containing an acceptance of the property at the price and on the terms mentioned. This was refused. He now brings his action for specific performance of the agreement.

In her statement of defence the defendant denies having offered or agreed in writing to sell the land to the plaintiff; she alleges that no person had authority from her to do so; she further alleges that the said agreement, if given, was not under seal, and was without consideration and not binding.

In his evidence the plaintiff stated that his American purchaser did not turn up, but that he accepted the offer for himself. He says that the price mentioned between himself and the defendant at the outset was $6 a foot frontage or $300 for the 50 feet; that, when he obtained the option, the land was worth $6 or $7 a foot; but that it very suddenly increased in value, and when he handed in his acceptance it was worth $50 or $60 a foot.

The defendant swears that she never authorized her husband to give the option, and W. J. Sanford states also that he never had authority to sign the agreement. It is true that the defendant told the plaintiff she was willing to take

$300 for the property, and intimated to him that he might go and see her husband about the option; but is that sufficient to be construed as a formal authority to her husband to sign the agreement without herself seeing it or discussing its terms with her husband?

The letter of acceptance has not been produced. The defendant says she does not know what has become of the letter handed to her. The plaintiff states that he generally keeps a copy of his correspondence; but he cannot find the copy of this letter. He pretends, however, to remember the contents thereof, and he stated what it was.

The defendant says that, when the question of selling her property was first discussed, she told the plaintiff that she would sell it with the condition attached that a private house should be built on it, as she wanted no other than a private house alongside of her own house on the adjoining lot.

The land had been purchased by the defendant 2 years before with money coming from her husband, who had given it to her.

The above are the main facts of the case as brought out in evidence. They may be summarized thus. The land, though purchased with money given to the defendant by her husband, stands in her name and is legally her property. The agreement or option was signed by W. J. Sanford, and, as sworn to by both, without any formal authority to him to do so. The document does not give a complete description of the land, as it does not state where it is situated, whether in Portage la Priarie or elsewhere. This might be supplemented by oral evidence if everything else was in proper form; but the document in itself is thereby incomplete. The letter of acceptance is not produced; its presumed contents are verbally given by the plaintiff, but that is very unsatisfactory; that leaves some uncertainty as to its true contents, and even as to its date.

This agreement or option is not under seal, and was given without any consideration. I do not see how the Court, under the circumstances of the case, can decree specific performance of the agreement.

In my opinion, the action should be dismissed with costs.

MANITOBA.

DUBUC, C.J. JUNE 15TH, 1907.

TRIAL.

GORDON v. LEARY.

Principal and Agent — Sale of Goods to Agent — Liability of Principal for Price—Evidence.

Action for the price of goods sold and delivered by plaintiffs to defendant or his agent.

C. P. Fullerton, for plaintiffs.

G. A. Elliott and M. G. Macneill, for defendant.

DUBUC, C.J.:—In March, 1906, defendant, desiring to assist his son, J. G. Leary, in the opening of a small shop in Fort Rouge, Winnipeg, introduced him to the plaintiffs, and asked them to extend to him the courtesies of the trade. He also saw Mr. Gordon, one of the plaintiffs, and told him that he wanted the business to be done on a cash basis.

The son opened the shop under the firm name of J. G. Leary & Co. A few months afterwards, it was found that the business was not paying, and that money had been lost in it.

In June of the same year the defendant asked John C. Schofield, who had been in his employ before, to go and see how the business was going on; and, subsequently, he prevailed upon him to take charge of the business as manager. He engaged him as such at a salary of $75 a month. Schofield took charge of the business on the first Monday in July, and J. G. Leary gave him the keys of the shop. Schofield found in the shop fresh meat to run about one day, and cured meat two days. A few days later J. G. Leary came to the shop, took some cash and also some customers' accounts. Schofield reported the matter to the defendant and said he would not stand that. The defendant told him that he would stop that; that he, as manager, had charge of the whole business; and that his son had nothing to do with it. J. G. Leary went away and was not seen about the shop until some time in November.

About 1st August Schofield applied to the defendant for $200 to carry on the business, saying he expected to be able to repay it out of the business. The defendant gave him the $200.

About the middle of July Schofield went to see Eagle, salesman of the plaintiffs, told him that the defendant had put him in charge of the business as manager of the meat shop, that he wanted a line of credit, and that defendant was to be responsible for any goods ordered by him as manager; he added that he would see them paid. This was agreed upon, and goods were afterwards supplied by the plaintiffs. Schofield says that, once or twice, he had conversation with the defendant about the plaintiffs' account; that the defendant said that he did not know they were running an account; and he, Schofield, told him he did not know they were not to run an account with the plaintiffs, as they were running accounts with other people.

In November, as the business was not improving, the defendant told Schofield that, if he could not run the business without loss, he should close the shop. It was closed on 15th December.

In cross-examination the defendant admitted that, at the time of the trial, he was carrying on the same business with the same tools and furnishings as before; that he was employing his son in it at $15 a week.

The defendant contends that the business was his son's business, and not his own, and that he is not liable for those goods, as he had never authorized the running of an account with the plaintiffs.

The evidence shews that J. G. Leary was living with his father; that he had some money put into the business when he opened the shop in March; that the business was frequently discussed between them; and that the defendant used to advise his son about it.

It is true that the defendant never specially or formally authorized Schofield to run an account with the plaintiffs, but Schofield was engaged by the defendant himself and placed in charge of the business as manager. He considered —with reasonable ground for so doing—that he was employed by the defendant, and not by his son, and that he was managing the business for the defendant. As such manager, he found that he could not carry on the business without buying goods on credit and running an account. It was as manager of the defendant's business that he applied

to the plaintiffs for a line of credit; and it was on his representations as such that the plaintiffs advanced the goods in question. They continued to charge the goods in their books to J. G. Leary & Co.; but that may, under the circumstances, be considered as a matter of book-keeping; and the plaintiffs may have reasonably believed, in the absence of any contrary information, that the defendant wished the business to be continued in the same firm name as it had been done before.

In Watteau v. Fenwick, [1893] 1 Q. B. 346, the defendants, owners of a beer-house, appointed a manager, had the license taken in the manager's name, and had also his name appearing over the door. They forbade the manager to purchase certain articles for the purpose of the business, which were to be supplied by the defendants; but the manager, in contravention of his instructions, ordered such articles from the plaintiff for use in the business. The plaintiff supplied the goods and gave credit for them to the manager only. Subsequently upon discovering that defendants were the real owners of the business, the plaintiff sued them for the value of the goods. It was held that the plaintiff was entitled to maintain the action, for the defendants, as the real principals, were liable for all acts of their agent which were within the authority usually conferred upon an agent of his particular character, although he had never been held out by the defendants as their agent, and although the authority actually given to him by them had been exceeded.

The case of Hutchings v. Adams, 12 Man. L. R. 118, is to the same effect.

In the present case, finding, as I do, that the business, though carried on in the firm name formerly adopted by the son, was in reality the defendant's business, that Schofield, being engaged and employed by the defendant, had reason to believe that he was managing the business for the defendant, that the plaintiffs, on Schofield's representations, advanced the goods to the defendant, I think that, under the above cases, the defendant should be held liable for the value of the said goods.

Schofield, though not specially authorized by the defendant to purchase the goods on credit, acted in so doing, within the authority usually conferred upon an agent of his particular character. Even if he had bought them in his own name, the plaintiffs, under Watteau v. Fenwick, would

be entitled to recover their value from the defendant as an undisclosed principal.

The plaintiffs are entitled to judgment for the amount of their claim with costs.

MANITOBA.

MATHERS, J. JUNE 19TH, 1907.

TRIAL.

IRISH v. McKENZIE.

Vendor and Purchaser—Contract for Sale of Land—Action by Purchaser for Specific Performance—Concealment by Purchaser of Material Fact Affecting Value of Land—Misrepresentation—Refusal of Court to Adjudge Performance.

Action for specific performance.

T. R. Ferguson and J. A. McKay, for plaintiff.

C. P. Fullerton, for defendant.

MATHERS, J.:—This is an action for specific performance of an agreement to sell the north-west quarter of section 2 in township 11, range 4 east of the principal meridian in Manitoba. The land is situate about 8 miles east of the city of Winnipeg, in the municipality of Springfield, within half a mile of the easterly limit of the land recently acquired by the Commissioners of the National Transcontinental Railway for a site for shops and yards. The Commissioners had, early in 1906, acquired an option upon the land subsequently purchased, which option they exercised on 20th December, 1906. On the morning of 20th December the "Morning Free Press" contained an announcement, dated at Ottawa on the 19th, that the Transcontinental Railway Commissioners were negotiating for the purchase of a large tract of land east of Winnipeg, as a site for shops and yards for the Transcontinental Railway. The same announcement appeared in the "Evening News Bulletin," for which the plaintiff was a regular subscriber. That same day the

"Evening Telegram" contained an article discussing the purchase at some length, and its effect upon real estate values. On 21st December, both morning papers and both evening papers contained the same announcement in prominent places.

Early in 1906 it had become rumoured that the shops and yards of this railway were to be located east of Winnipeg, and, in consequence of this rumour, an active movement in buying and selling real estate in that locality took place. The year before, the defendant McKenzie (hereinafter referred to as "the defendant") had listed his farm for sale at $28 per acre. He subsequently advanced the price to $50 per acre, and in June, 1906, the price was $65 per acre. About this time one of his neighbours obtained a list of lands in the locality for sale, and placed them in the hands of a real estate agent in Winnipeg. The defendant put the land in question in at $100 per acre. From July, 1906, until the definite announcement was made of the location of these shops, nothing further was heard, and matters considerably quieted down, and it appeared as if the prices of land were not going to further advance, and possibly might recede.

The plaintiff is a life insurance agent, but he also transacts some business as a fire insurance agent. In December, he had a conversation with a real estate agent in Winnipeg, who had been purchasing lands in the locality named, and on his advice plaintiff undertook to obtain options in this district. On the 19th December he drove out to see his brother-in-law, one Corbett, for the purpose of negotiating with him as to the purchase of his farm. This farm is about 3 miles further east than the defendant's. He met Corbett on the way, and returned with him towards Winnipeg. On reaching the defendant's farm he called in, he says, for the purpose of finding out if he wanted his buildings insured. Having ascertained that the defendant did not want insurance, plaintiff asked him if he wanted to sell his farm, and was told that he did. Plaintiff then asked what the price was, and he was told by McKenzie that he had been offered $65 per acre. McKenzie says that the plaintiff told him he was a fool for not having taken it, because he never would get that price again, but plaintiff denies having made any such statement. Nothing further appears to have taken place, except that the plaintiff told defendant to think it over, and he would be out again in a few days, and see him

about his farm. On the morning of the 21st the plaintiff, who resides in Winnipeg, again drove out to the defendant's farm, arriving there about 10 o'clock in the morning. He says he did not go for the purpose of seeing McKenzie, but to see one McMillan, a neighbour, but he did see McKenzie, and secured an option on the land above described at $45 per acre, payable, $2,000 cash, and the balance in 3 annual payments of $933, with interest at 6 per cent., after deducting a mortgage for $2,400 due to the Canada Permanent Mortgage Co. There was a further mortgage of $400, which the vendor was to pay off. The option was to continue until 21st February, and for this option the plaintiff paid McKenzie $3. On the following day defendant heard from his sons, who reside in Winnipeg, of the definite announcement of the location of the railway shops. On the 28th he came into Winnipeg and saw the plaintiff, and asked him to cancel the agreement, but the plaintiff refused. On 2nd January he again called and tendered back to plaintiff the $3 paid for the option, and asked him to cancel the agreement. On plaintiff refusing, he offered to pay him for his trouble if he would let him out of the contract. That same day he was offered $75 per acre for the land. He consulted a solicitor, and afterwards entered into an agreement to sell to his co-defendants, provided the plaintiff could not hold him to the agreement made.

The defendant says he understood the document he signed for the plaintiff to be an employment of the plaintiff as agent to sell only, and that he was not giving him an option to purchase. This contention of McKenzie is not, however, borne out either by the evidence or the circumstances. I believe he knew quite well the character of the document he signed.

On 2nd January plaintiff told McKenzie, when he called upon him, that he was going to take the property.

At the time the defendant McKenzie entered into the agreement with the plaintiff, he knew nothing about the announcement that had been made in the newspapers of the definite purchase of a site for shops of the National Transcontinental Railway. I find, as a fact, that the plaintiff did know of this announcement on the evening of 20th December, and that, in consequence, he started early in the morning of the 21st to secure an option from the defendant, before he should become aware of it. In order to reach the de-

fendant's place by 10 o'clock in the morning, it would be necessary for him to leave Winnipeg at daylight, or very shortly after. The defendant says that in order to induce him to sign the contract, the plaintiff represented that the shops were going to be located to the south-west of Winnipeg, and that the prices of the land would go down lower than ever. In that statement he is corroborated by his wife. The plaintiff says that the question of the location of the shops was never mentioned at either interview. That statement seems to me improbable. The question of the location of these shops was a very live topic amongst the owners of land in that locality. The defendant had listed his lands with an estate agent in Winnipeg at $100 per acre, as had several of his neighbours. He had been offered $65 an acre if he could give a clear title. Something must have been said or done to induce him to drop from $100 an acre to $45. I, therefore, accept the statement of the defendant and his wife, that that subject was mentioned.

The plaintiff in January, 1907, bought lands close to the defendant's at $80 per acre. The defendant knew that the land bought, as he supposed, for the Transcontinental Railway, had been bought at $125 per acre. The plaintiff knew that the shops were definitely located upon that land. Under such circumstances. the slightest hint or suggestion intended to create a different impression in the mind of the defendant would be sufficient to prevent the specific performance of this agreement.

In Ellard v. Llandaff, 1 B. & B. 241, it was held that where a lessee for a life, while negotiating with the lessor for a new lease and the surrender of the old, knew that the life during which the lease was held, was in extremis, a fact of which the lessor was ignorant, to the knowledge of the lessee, and which the lessee did not disclose to him, the Court would not specifically perform the agreement so procured, basing the refusal upon the suppression by the lessee of a material fact known to him but not known to the lessor. The subsequent cases, however, have not gone so far. The law as now accepted was thus stated by Lord Chancellor Campbell in Walters v. Morgan, 8 DeG. F. & J. at p. 723: "There being no fiduciary relation between vendor and purchaser in the negotiation, the purchaser is not bound to disclose any fact exclusively within his knowledge which might reasonably be expected to influence the price of the subject to be sold. Simple reticence does not amount

to legal fraud, however it may be viewed by moralists; but a single word, or (I may add), a nod, or a wink, or a shake of the head, or a smile, from the purchaser, intended to induce the vendor to believe the existence of a non-existing fact which might influence the price of the subject to be sold, would be sufficient ground for a court of equity to refuse a decree for specific performance of the agreement." That passage is quoted by Chitty, J., in Turner v. Green, [1895] 2 Ch. 205, as being a correct statement of the law.

I cannot believe that the probable location of the railway shops was not discussed when the parties met on 21st December, the day the agreement was entered into. Both the defendant and his wife swear positively that it was talked of, and that the plaintiff told them that the shops were going to be located to the south-west of Winnipeg. That this subject was discussed is in entire accord with the probabilities of the case and, as there is also a large preponderance of evidence in favour of the defendant's version of what took place, I accept his statement as true. That finding is sufficient, within the authorities, to dispose of this case in the defendant's favour. I arrive at this conclusion without regret, as there was a large element of unfairness in the whole transaction.

The plaintiff was not bound to buy. He was only risking the sum of $3, and for that sum he had tied up the defendant's land for 2 months. At the time he did this he had reason to believe that the definite announcement of the location of the shops would cause a large and immediate advance in the price of land in that locality, and that the demand for land there would at once become active. I have no doubt but that he expected within the 2 months to effect a sale at a large advance. The fact that in less than one month he had bought the adjoining land at $80 per acre, and that subsequently other lands not much more favourably located were sold for $140 per acre, shews that he had correctly forecast what was likely to take place. Finding as I do that plaintiff knew of the definite announcement of the location of the shops close to the defendant's land, a fact concerning which the defendant was ignorant, and that the plaintiff, in order to induce the defendant to enter into the contract now sought to be specifically performed, misrepresented the facts to the defendant, it would be most inequitable to decree performance of this agreement.

As to the defendants Henderson and Cockburn, they are charged by the plaintiff with conspiracy to defraud him. By their defences these defendants disclaimed all interest in the land, but, notwithstanding, the plaintiff still maintains the allegation of conspiracy, in support of which no evidence whatever was offered. Under the circumstances the action must be dismissed as against all the defendants, with costs.

MANITOBA.

JUNE 19TH, 1907.

COURT OF APPEAL.

DEAN v. LEHBERG.

Executors and Administrators — Action against Administrator for Value of Services to Estate after Decease of Intestate — No Right to Recover against Estate — Right to Recover against Administrator in Personal Capacity.

Appeal by defendant from the decision of the senior Judge of the County Court of Winnipeg. The action was against "John Louis Lehberg, as administrator of the estate of Ada Louise Lehberg, deceased." The plaintiff sought to recover $210 for work and services performed by him upon a farm owned by the deceased at the time of her death.

The evidence shewed that the farm was purchased about November, 1905. The defendant, who was the husband of the deceased, and who was then residing in England, corresponded with the plaintiff, then in Manitoba, in reference to working the farm. In April, 1906, the plaintiff took charge of the farm and managed it for some months. On 1st February, 1906, Ada Louise Lehberg died. At the time of her death no arrangement had been concluded with the plaintiff. He took charge of the farm and performed the services under instructions given by the husband of the deceased after her death, these instructions being contained in letters from the husband to him. The defendant came to Manitoba in the summer of 1906. On 20th August, 1906, he took out letters of administration to the estate of the deceased, and about that time assumed the management of

the farm. Plaintiff ceased to work for defendant on 1st November, 1906. Plaintiff admitted that no definite sum for wages was agreed upon, and he claimed a quantum meruit.

At the close of the plaintiff's case a motion for nonsuit was made on the ground that no cause of action was proved against defendant in his representative capacity. This was refused, and at the close of the trial a verdict was entered against defendant, as administrator, for $210. From this verdict defendant appealed.

E. A. Conde, for defendant.

H. Turnbull, for plaintiff.

The judgment of the Court (HOWELL, C.J.A., PERDUE, J.A., and PHIPPEN, J.A.), was delivered by

PERDUE, J.A.:—It is clear from the evidence that the plaintiff had no cause of action against the deceased lady, in her lifetime, in respect of the services rendered. It is also clear that he made no contract or agreement with her, in her lifetime, respecting these services upon which any cause of action could be founded. The agreement under which he did the work and performed the services was made with her husband after her death. How then is it possible to hold her estate liable for such work and services? Counsel for the plaintiff argued that, as the estate had received the benefit, it should, therefore, be liable. No authority was cited which would support such a contention. The contract was made with the husband, not with the deceased, or with the estate of the deceased. The husband did not become administrator until several months had elapsed after the making of the contract, and until after the greater part of the work and services had been performed. Even in respect of what was performed after the issue of the letters of administration, the plaintiff cannot recover against the estate.

In Farhall v. Farhall, L.R. 7 Ch. 123, the executrix of a testator kept an executorship account with a bank, and, having power under the will to mortgage real estate, she deposited with the bank title deeds of part of the testator's real estate as security for the balance. The account was overdrawn by the executrix. The security having proved insufficient to pay the balance, the bank applied to prove as

creditors of the estate. It was held that they were not entitled so to prove; for that a person cannot by contract with an executor acquire a right to prove as a creditor against the estate, even though the executor has power to give him a lien on specific assets. The rights and liabilities of an executor in respect of contracts made by him are somewhat fully discussed in the judgment of Mellish, L.J., delivered in that case, and the authorities are discussed and summed up in a very instructive manner. It is clear from the judgment and the cases referred to in it that an executor can charge the estate of a contract made by himself only where the consideration for his promise was some contract or transaction with the testator. If the plaintiff sues an executor, as executor, for work done for the defendant, as executor, at his request, and alleges that defendant, as executor, promised to pay, the defendant is charged in his personal, and not in his representative, capacity, as work cannot be performed for another in his representative character: Farhall v. Farhall, supra at p. 128; Corner v. Shew, 3 M. & W. 350; Williams on Executors, 10th ed., vol. 2, p. 1416. Work or services performed for an executor, at his request, are recoverable against him personally, be being entitled to recoup himself from the assets of the estate where the work and services were for the benefit of the estate.

The position of an administrator is, in this respect, similar to that of an executor, except that, in the case of an executor, the will may give him wider powers in his dealings with the estate than are possessed by an administrator.

The particulars of claim in the present case shew that the work and services sued for were performed at the defendant's request. This charges the defendant in his personal capacity, but not in his representative character, as the administrator of his deceased wife.

The appeal should be allowed and the action dismissed as against the administrator with costs, and costs of the appeal. It was arranged on the hearing of the appeal that a verdict for the plaintiff should be entered against defendant, in his personal capacity only, for $210. By consent of counsel the above costs are to be set off pro tanto as against the verdict, and judgment will be entered for the balance against the party from whom such balance shall be found due.

MANITOBA.

JUNE 29TH, 1907.

COURT OF APPEAL.

UNION BANK OF CANADA v. DOMINION BANK.

Banks—Forgery of Cheque—Deposit by Forger in Another Bank—Presentation by Bank Through Clearing House—Payment by Drawee Bank—Action to Recover Amount Paid from Second Bank—Negligence—Equities—Legal Rights—Mistake—Estoppel.

Appeal by plaintiff from judgment of DUBUC, C.J.M., 4 W. L. R. 407.

The Manitoba Government issued its cheque on the Union Bank of Canada in favour of the Consolidated Stationery Co. for $6, and one Jones, a clerk in the company's employ, received it into his possession. He erased the name of the payee, substituting the fictitious name of William Johnson, and raised the amount of the cheque to $1,000. The alterations were so skilfully made that the cheque passed the scrutiny of two banks without the fraud being detected.

Jones, having indorsed the cheque in blank in Johnson's name, endeavoured to negotiate it at the Union Bank. The accountant refused to cash it without identification, and Jones left, saying he had done business with the Bank of Montreal and would arrange it there.

On 26th January Jones called at a branch office of the Dominion Bank, stating he wished to open a savings bank account. The manager asked him several questions, which, apparently, Jones answered to his satisfaction. The account was then opened in Johnson's name (whom Jones represented himself to be), Jones depositing the cheque to Johnson's credit and withdrawing $25 in cash.

The $1,000 cheque was then marked on the back with a rubber stamp in a manner which, under the rules of the local clearing house and the practice among Winnipeg bankers, had the legal effect of an indorsement in blank by the

defendant bank. It was then cleared and duly honoured by the Union Bank on the following day, 27th January.

On 1st February Jones, in the character of Johnson, drew, by cheque, an additional $800 from his account in the Dominion Bank. It was clear from the evidence that the defendant bank, in making this payment, relied on the fact that the $1,000 cheque had been honoured, and that they would not have advanced any considerable sum over $25 on the 26th under circumstances as they then existed.

On 3rd February the forgery was discovered by an official of the Government in verifying the returned January cheques, and notice was immediately given to the Dominion Bank and repayment demanded. The demand, at first verbal, was put in the form of a letter on 17th February.

The case was tried before DUBUC, C.J., who gave judgment in favour of defendants, and plaintiffs appealed.

The appeal was heard by HOWELL, C.J.A., RICHARDS, PERDUE, PHIPPEN, JJ.A.

C. P. Wilson, for plaintiffs.

J. H. Munson, K.C., and D. H. Laird. for defendants.

HOWELL, C.J.A.:—I have had the advantage of reading the judgment of my brother Phippen, who has succinctly stated the facts, and I concur in his decision.

The case of Imperial Bank v. Bank of Hamilton, [1903] A.C. 49, was decided solely on the ground of mistake, and the decision of Mr. Justice Idington in Bank of Montreal v. The King, 38 S. C. R. 258, followed the same line of thought. In each of these cases the banks had not changed their position because of receiving the money. In the present case, the receiving bank refused to pay over until after they had received the proceeds of the cheque. They only paid over the money because it had been received and had thereby become liable to the depositor, and all in good faith.

Moneys paid in mistake were, by the old system of pleading, recoverable under the common money counts, and, as I read the cases, the plaintiff succeeded because it was unconscionable for the defendant to retain the money, but if, because of the payment to the defendant, he had changed his position, there would be a countervailing equity and a good defence. It seems to me that Kelly v. Solari, 9 M. & W. 54, is not a decision against this view of the law. There

was no evidence in that case that the defendant had changed her position; there was merely a new trial granted. If she had in that case distributed the money, I cannot think that the Court would have made her liable for money which she had innocently paid over solely because the plaintiffs had made a mistake in paying to her. There must be a finality somewhere.

It may be said, then, that if in the case of Imperial Bank v. Bank of Hamilton the defendants had, after receiving the money, changed their position, the result would have been different. I do not think so. The right of recovery, as I view the law, on the ground of mistake, would not have been tenable, but there would have been a right of recovery because of the implied contract which the defendants in that case entered into by impliedly warranting that the document for which payment was demanded was what it purported to be, and that the defendants were the lawful holders —unless possibly it might be held that there was no implied warranty, because of the original cheque being once in the defendants' hands and marked good. If there was such a warranty, the defendants were liable whether they subsequently changed their position or not. The contract side of that case was not in any way raised by the plaintiffs throughout its long career, and because of this I have gone into the matter at some length in order that I may dispose of doubts raised in my mind.

It seems to me there was in the case before us the same warranty implied as was implied in the case of Bank of Ottawa v. Harty, 12 O. L. R. 218, 7 O. W. R. 869.

It might be said that this case differs from the one just cited, because of the indorsement, and that there are no contracts or warranties outside of that created by the indorsement.

The plain answer is, that the indorsement creates a liability within sec. 24, sub-sec. 2, or within sec. 55, sub-sec. (c), or within sec. 58 of the Bills of Exchange Act, 1890. The defendants are made liable by statute, and, if not, then it seems to me that the indorsement must be merely a method of transfer, and the implied warranties arise. In either event the defendants are liable.

If a bank upon which a cheque has been drawn is required to investigate the genuineness of the instrument and of the rights of the party demanding payment—other than the signature of the drawer— when the party so claim-

ing payment is a bank doing business through a clearing house, commercial transactions could scarcely be carried on.

The verdict will be for the plaintiffs for $1,000, with costs of the trial and of this appeal.

PHIPPEN, J.A.:—The defendants do not deny the plaintiffs' right to recover the $175 still on hand, for which judgment has been entered below, or the $25 paid before the cheque was cashed. Defendants' counsel admits that if the $1,000 was still with the defendant bank, plaintiffs would be entitled to recover, but contends that the $800 having been disbursed subsequently to the payment of the fraudulent cheque, the plaintiffs will not now be heard to demand it back.

In the view I take of the law, the plaintiffs must succeed. This is not the case of a bank paying a cheque with the signature of the drawer forged. There the paying bank are deemed to know the signature of their own customer, or, as Chief Justice Moss puts it in Rex v. Bank of Montreal, 11 O. L. R. 600, the paying bank in such a case relies, or are deemed to rely, on their own knowledge of their customer's signature rather than on any implied representation made by the bank demanding payment. But a bank presenting a cheque for payment is deemed to know its own title: Bank of Ottawa v. Harty, 12 O. L. R. 218; Akrokerri Mines v. Economic Bank, [1904] 2 K. B. 465; Attorney-General v. Odell, [1906] 2 Ch. 47. Acceptance of a bill, while estopping the acceptor from denying the drawer's signature, is not an acknowledgment of the signature of an indorser, when, at least, the indorser is not the drawer. See cases collected in Ryan v. Bank of Montreal, 14 A. R. 558.

A bank upon which a cheque is drawn cannot be called upon by the holder to guarantee, or even pass upon, the signature of the indorsers, apparently in order, through whom the holder claims. That is the holder's own business. The bank cannot be called upon to say that the cheque was originally issued for the amount it calls for when presented. That is something of which the bank are not expected to have previous knowledge. They must determine whether they are satisfied to accept the maker's signature as the genuine and proper signature of their customer, if they are in funds to meet the demand, but they do this ordinarily on the implied representation from the person presenting

that he is in fact its lawful holder and that it is a cheque for the amount shewn on its face. In other words, the person requesting payment represents his title to the document and to the amount, but not to the maker's signature. Should the implied representation prove untrue, the receiver can be called upon to repay as for a breach of contract; and, meeting the defendants' contention, payment upon a representation, express or implied, cannot itself be made the basis of an estoppel against the representor in an action for its breach.

Holding thus, it does not seem to me that the defendants can avoid their admitted obligation to return the money received, because they subsequently paid it to Jones. Assuming the case did raise this question, the fact that the Dominion Bank relied on the payment by the Union Bank when disbursing the $800, does not, to my mind, work an estoppel. They had no business to rely on this fact. The Union Bank did not, by their action, represent that Johnson was entitled to the money. They did not represent that the cheque was originally lawfully issued for $1,000. On these points it was the duty of the Dominion Bank to be themselves informed. It may have become the plaintiffs' duty to bring the fact of payment to the attention of their principals, the government, within reasonable time, and, should anything prove wrong, to then promptly notify the defendants, but in this case no question of such an estoppel arises.

Since writing the above conclusions, Mr. Munson has handed in a memorandum of cases, to two or three of which, most nearly in point, it is perhaps desirable I should refer.

Leather v. Simpson, L. R. 11 Eq. 398, is clearly distinguishable from the present case, on, at least, one ground. There the Court found the plaintiff, in accepting and paying the bill, did not rely on any representation by the defendant, but on representations by, and course of trading with, the plaintiff's correspondent in America, by whom the fraud was perpetrated.

Implied representation or warranty is a question arising out of the facts of each particular case, and, to sustain an action, must not only be untrue but must be relied upon by the person to whom made. It might well be that a cheque could be paid or a bill accepted under circumstances which

would imply no representation by the holder, or which would make it apparent that, if implied, the representation was not relied on. Such was the case of Leather v. Simpson, such also Robinson v. Reynolds, 2 Q. B. 196. In the present case there is no evidence to negative the ordinary presumption arising from demanding and receiving payment. On the contrary, the fact that the plaintiffs had refused to pay Jones in person, while readily cashing the cheque for the Dominion Bank, tends to shew that the implied representation was material.

Smith v. Mercer, 6 Taunt. 76, is distinguishable on facts readily apparent from the judgments there given. In the present case, as there relied upon by Dallas, J., there was no want of due caution by the Union Bank in paying the cheque; neither were there any indorsers released by the delay, as relied on by Gibbs, C.J.

I do not feel bound by London and River Plate Bank v. Bank of Liverpool, [1896] 1 Q. B. 7. Even if that case were an apparent direct authority, I could not accept the holding of Mathew, J., that the mere retention of money by the person receiving it constitutes a change in the receiver's position which he can successfully set up as an answer to an otherwise indefensible action for its return.

The crux of the distinction between the present case and the others referred to in Mr. Munson's memorandum can perhaps be found in the language of Chief Justice Sir A. Dorion in Union Bank v. Ontario Bank, 24 L. C. J. 316, where he is reported as saying: "The Ontario Bank was misled by the only party who could know what was the amount of the draft." In such a case, subsequently acted upon, there is a clear estoppel, a position not tenable here.

On these grounds, I think the appeal should be allowed and judgment entered for the plaintiffs against the defendants for $1,000, with interest from the date of action and costs both of the trial and the appeal.

RICHARDS and PERDUE, JJ.A., concurred.

MANITOBA.

JUNE 29TH, 1907.

COURT OF APPEAL.

SLINGSBY MANUFACTURING CO. v. GELLER.

Partnership—Special Partner—Declaration of Partnership—Alleged False Statement—Contribution of Special Partner to Capital—Date of Declaration—Name of Firm—Recording Declaration at Large—Non-compliance with Partnership Act — Defects in Creation of Limited Partnership — Effect of — Special Partner Becoming General Partner — Liability for Debts of Firm — Construction of Statute — Payment of Special Contribution — Cheques—Proof of Payment — Promissory Note — Proof of Presentment—Bill of Exchange—Proof of Indorsement—Objections Raised for the First Time on Appeal.

Appeal from plaintiffs from judgment of PHIPPEN, J.A., 5 W. L. R. 128, dismissing the action as against defendant Rosenthal.

The appeal was heard by RICHARDS and PERDUE, JJ.A.

J. D. Cameron and H. Phillipps, for plaintiffs.

H. A. Robson and A. M. S. Ross, for defendant Rosenthal.

RICHARDS, J.A.:—Geller and Haid, who had been carrying on business together as merchants, agreed with Rosenthal to form a partnership, in which Geller and Haid would be general partners, and Rosenthal a special partner. Rosenthal was to contribute $4,000 and get 30 per cent. of the profits of the business. A certificate, as provided by sec. 66 of the Partnership Act, R. S. M. 1902 ch. 129, was filed in the office of the prothonotary, but was not recorded at large, as provided by sec. 68, as no book, such as is required by sec. 68, was kept by the prothonotary.

Rosenthal contributed the $4,000 by cheques, which were put to the credit of the business. The partnership name, as agreed to, and as stated in the filed certificate, was "The Winnipeg Shirt and Overall Manufacturing Company."

Rosenthal was not shewn to have taken any part in the partnership affairs after the filing of the certificate and contribution of the money.

The plaintiffs in this action sued him, together with Geller and Haid, on a bill of exchange accepted, and a promissory note made by the company. Judgment went by default against Geller and Haid, and Rosenthal defended, setting up that his partnership was a limited one, as well as denying that he ever was a member of the firm.

The trial Judge held that, because the certificate was not recorded at large, there was no special partnership, as sec. 69 of the Partnership Act says that no such partnership shall be deemed to have been formed until the certificate is "made, certified, filed, and recorded as above directed." He held that the word "recorded" in sec. 69 means "recorded at large," as provided for in sec. 68. The trial Judge gave other reasons for holding that no special partnership existed; but the above seems to me sufficient to enable me to agree with him. He further held that, as Rosenthal did no further acts after the contribution of the $4,000 and the filing of the certificate, no partnership of any kind existed, and that, therefore, Rosenthal was not liable to the plaintiffs on the bill of exchange and promissory note. With much deference, I am unable to agree with my learned brother in this view of the position. He says the only express contract entered into between the parties is contained in the declaration filed. I do not so regard the case. The evidence seems to me to shew that a partnership was verbally agreed to, with the further provision that such proceedings should be taken as should prevent Rosenthal from being liable as a general partner to the creditors of the firm, and the declaration I take to have been only executed and filed with the view of preventing Rosenthal's liability to creditors, as a general partner, from arising.

As the special partnership was not formed, it seems to me that the only part which failed of the arrangement between the parties, is the limitation or prevention of Rosenthal's liability. The trial Judge apparently held that power to Rosenthal to bind his co-partners was a necessary element of general partnership, and that, as this would be lacking in the special partnership which was intended, no general partnership could arise. It seems to me from the case of Pooley v. Driver, 5 Ch. D. 474, that it is not necessary that a partner, who is not to take an active part in the business,

should, in order to constitute him a general partner, be constituted an agent of his fellow partners, or of the partnership. The question rather seems to me to be, whether Rosenthal did not, by entering into this partnership, without complying with the provisions as to special partnerships, make Geller and Haid, or the firm. his agents to bind him. With much respect to the views of my learned brother, the trial Judge, I am of opinion, though with some hesitation, that he did. Section 5 (c) of the Partnership Act enacts that the receipt by a person of a share of the profits of the business is prima facie evidence that he is a partner in the business. It seems to me that the agreement that he is to receive a share is, for the purpose of that sub-section, the same as the actual receipt. It is true that the receipt of a share of the profits does not necessarily make him a partner, but it raises a very strong presumption that he is. See Pooley v. Driver, supra, and Ex p. Tennant, 6 Ch. D. 303. That presumption can, in some cases, be met by evidence of facts inconsistent with the existence of a partnership. It seems to me that in the present case the onus of proving such facts was cast on Rosenthal, and none such were shewn.

It is clear that Rosenthal did not pay in his money as a loan. Even if he had, it would be a question whether, in the absence of written evidence of the agreement for the loan, he would not have become a partner: Re Fort, [1897] 2 Q. B. 495. The money was, it seems to me, paid in as part of the partnership capital of the Winnipeg Shirt and Overall Manufacturing Company, with an agreement for a share of the profits. I am unable to see how Rosenthal, after failing to secure immunity under the provisions of the law as to special partners, was, as against creditors, in any way in a better position than he would have been if there had been no agreement that his partnership should be special. I think he became practically, as against creditors, a dormant general partner.

A question raised on the argument of the appeal, though not before the trial Judge, was that the instruments sued on were payable on their face at the Imperial Bank of Canada, in Winnipeg, and that no evidence of their presentment for payment before action was given. Proctor v. Parker, 12 Man. L. R. 533, shews that it was not open to the defence to raise this question for the first time on the appeal.

I think the appeal should be allowed with costs. The judgment already entered to be set aside and judgment entered for the plaintiffs in the King's Bench for the full amount of the bill of exchange and promissory note sued on, with costs.

PERDUE, J.A.:—The questions dealt with in the judgment appealed from were: (1) Was Rosenthal a special partner in the firm and entitled to the protection against general liability conferred upon special partners by the Partnership Act? (2) If not, was he liable as an ordinary partner?

The trial Judge has found that the requirements prescribed by the clauses of the statute which relate to the formation of special partnerships were not complied with, inasmuch as the certificate was not recorded at large in the office of the prothonotary of the Court of King's Bench, and that the name under which the partnership was carried on was not one in which the names of the general partners, or some or one of them, only was used.

Under sec. 68 it was necessary in this case that the certificate should be recorded at large in a book to be kept for that purpose in the office of the prothonotary of the Court of King's Bench. By sec. 69 no such partnership—that is to say, no limited partnership—shall be deemed to have been formed until the certificate has been recorded as above. The certificate was filed, but never recorded, as required by the statute. It is not for this Court to say upon whose shoulders the blame for this omission should rest. The fact remains that a condition precedent prescribed by the Act has not been complied with, and the result must be, as the Judge appealed from has decided, that no special partnership was legally formed.

Section 72 is as follows: "The business of the partnership shall be conducted under a name, or firm, in which the names of the general partners, or some, or one of them, only shall be used; and if the name of any special partner be used in such firm with his privity, he shall be deemed a general partner."

The firm name under which defendants were trading was "The Winnipeg Shirt and Overall Manufacturing Co." This does not contain the name of either of the general partners. It is not identified with the partners, or any of them, or with any particular person or persons. It may

designate either an ordinary trading firm or an incorporated company. This clause of the statute appears to be imperative, and the provision contained in it must be regarded as one of the terms or conditions under which such a partnership may be formed (sec. 61). The formation of a limited partnership would be defective upon this ground also.

The question then arises, what is the position of the defendant Rosenthal, in view of the failure to form a valid limited partnership? The trial Judge has found that Rosenthal did not become a general partner and was not liable as such. His reasons for so holding are put upon several grounds, which may shortly be stated as follows: (1) The statute imposes on the special partner liability as a general partner for infractions of certain of its provisions, but it does not impose such liability in the case of either of the objections above referred to. (2) There was no contract for a general partnership, or any intention on the part of Rosenthal to become a general partner.

The statute does, no doubt, declare in specific terms that in the case of certain infractions the partnership shall be deemed a general one, but this does not say that such consequence shall only follow in the instances specially mentioned. It does not declare that if there is total neglect to file the certificate the partnership shall be a general one, yet this consequence obviously should follow. At common law there is no such thing as a partnership, with limited liability, in one or more of its members: Lindley on Partnership, 7th ed., p. 229. Even if the articles of partnership expressly provided that liability of a member was to be limited to the amount which he put into the firm, he was still liable to creditors to an unlimited extent: Brown v. Tapscott, 6 M. & W. 119; Rex v. Dodd, 9 East 527; Greenwood's Case, 3 De G. M. & G. 477.

There was a failure to record the certificate in the manner prescribed by the statute. The result must be that the special partner is left in the position he would occupy at common law, so far as the liabilities to third parties are concerned. If he seeks to avail himself of the immunity furnished by the Act, he must bring himself within the provisions of it, and must shew that he has conformed with its directions. But the Judge has found that, because there was no contract, so far as Rosenthal is concerned, to enter into a general partnership, and no intention on his part to take any interest in the firm other than as a special

partner, he was, therefore, not a member of the firm and not liable as such.

If Rosenthal is neither a special nor a general partner in the firm, what is now his position with respect to it? He has put, as he and Geller say, $4,000 into the firm, and this has been used as part of its capital and assets. If he is not a partner, then he must be a creditor. The result would be that the ordinary creditors would find, instead of there being $4,000 contributed by Rosenthal to the capital stock of the partnership, as the certificate declares, that there was, in fact, no sum contributed by him as capital, but that he was a creditor, along with them, for the above amount, and entitled to share the depleted assets with them.

Counsel for the respondent sought by ingenious argument to avoid this dilemma, but, as it appears to me, without success. If Rosenthal bargained for a special partnership in a going concern, and paid in his money for that purpose, but was never admitted as or became a special partner, then he was a creditor of that concern and entitled to recover his money from it. The result would be that in a case like the present the special partner could avail himself of his own neglect or his own disobedience of the Act. and set up that he was not a special partner but a creditor, and this after he had received, or at all events bargained to receive, a share in the profits, and had had the other advantages to which a special partner is entitled. If that be so, a special partner might wholly disregard the statute and be in a better position than if he had complied with its provisions.

In the present case there is no pretence that the $4,000 was paid as a loan. It was paid as Rosenthal's contribution to the capital stock of the firm, upon an agreement that he was to be admitted as a special partner and to be entitled to 30 per cent. of the net profits of the business. This clearly appears from his statement of defence and from the evidence. With great deference to the views of the trial Judge, I think he erred in finding that the only express contract entered into between the parties was contained in the certificate filed. There is nothing said in that certificate as to how the profits were to be divided, or what share the respondent should receive. It is clear from the evidence and the statement of defence that negotiations took place which led up to the forming of a partnership in which the respondent was to be a special partner upon terms set-

tled between the parties. The certificate was not, and did not pretend to be, the contract between the parties. It did not express all the terms of the agreement. It simply contained the particulars required by the statute to be inserted in such a certificate for the information of the general public. As pointed out many years ago in Patterson v. Holland, 7 Gr. at p. 10, the certificate is not to be looked at as articles of co-partnership. It is not necessary to file articles of partnership. But, where there is a special partner, certain information must be furnished to the public, through the medium of the certificate.

It appears to me to be clearly established that Rosenthal intended to become, as he sets up in his defence, a special partner, or, as he puts it in his examination, a "side partner." He put in $4,000, the share of the capital to be furnished by him as a special partner. It was never intended that this was to be a loan, and it cannot be regarded as a loan. The money was embarked in the adventure as capital risked. If things went well, Rosenthal would share in the profits gained, and would be entitled to have his capital returned to him when the firm was wound up. If things went badly, he stood to lose both profits and capital. The position then clearly was that a partnership was formed between the parties: Lindley on Partnership, 7th ed., p. 49. It was intended, however, that the members should avail themselves of the provisions relating to special partnerships in order to limit the liability of Rosenthal to the amount he was putting into the business. They failed to comply with the provisions of the Act. Nevertheless, the firm went on trading and contracting debts, Rosenthal, all this time, believing he was a special partner and expecting to share in the profits. It appears to me that only one result can follow from such a state of affairs, and it is this: the special partner became a general partner so far as outsiders were concerned, whatever his position might be as regards his co-partners as between themselves. See Whittemore v. Macdonell, 6 C. P. 551; Patterson v. Holland, 7 Gr. 5; Andrews v. Schott, 10 Penn. St. 47; Ward v. Newell, 42 Barb. 482. This is not a case of imposing a penalty for non-observance of any of the requirements of the Act. It is the result that necessarily follows where a party, by non-compliance with the conditions imposed, fails to bring himself within the statute framed for his protection, and by

this failure leaves himself in the position he would be in if the statute had not been passed.

But it is urged that intention is a necessary element in the formation of a partnership, and that this element is lacking in the present case in so far as Rosenthal is concerned. To dispose of this objection one might use almost the exact language of Jessel, M.R., in Pooley v. Driver, 5 Ch. D. 483, merely adapting it to this case. What Rosenthal did not intend to do was to incur the liability of a partner. If intending to be a partner is intending to take a share in the profits, then he did intend to be a partner. If intending to take profits and have the business carried on for his benefit was intending to be a partner, he did intend to be a partner. If intending to have the liberty, from time to time, to examine into the state and progress of the partnership concern, to advise as to its management and possess the power of calling the other partners to account for their management of it, was intending to be a partner, then he did intend to be a partner. See secs. 76 and 77 of the Partnership Act. No doubt, Rosenthal did intend to be protected by the statute from liability to third parties. But, if the statute fails him, his intention will not protect him. He is in the position of one who has put his money into a trading concern in which he expects a share in the profits, in which he has the right to examine the affairs and advise in the management of the concern and call the other partners to account; who is not a lender of the money, but who has risked it in the venture, and who is willing to become responsible for the debts of the firm to the extent of the money paid in by him. I think there is no doubt that, under these circumstances, if he has not the protection of the statute, he must be held liable as a general partner.

The case of Pooley v. Driver, above referred to, was one in which certain persons put money into a trading concern, and sought and intended to be protected under Bovill's Act as lenders, and escape liability as partners, although they shared in the profits. Jessel, M.R., held that the transaction was not, under the facts of that particular case, one of loan, within the meaning of the Act, and it followed that the parties who intended to be protected as lenders became in fact dormant partners, and liable for all the debts of the concern.

The respondent's counsel strongly urged the argument that agency was the true test of partnership or no partnership, relying on Cox v. Hickman, 8 H. L. C. 268; Gosling v. Gaskell, [1897] A.C. 575; and other cases.

This test was sought to be applied with particular reference to the provision contained in the latter part of sec. 76, which prohibits a special partner from transacting any business on account of the partnership. It was argued that, as he is prevented from doing business for the firm, he cannot be an agent to bind the members, and that he is not, therefore, a partner in the ordinary legal sense. But when we come to examine the true application of the test of agency, it not only fails to assist the respondent, but operates against his contention.

In Cox v. Hickman, at p. 309, we find Lord Cranworth using the following words: "I can find no case in which a person has been made liable as a dormant or sleeping partner, where the trade might not fairly be said to have been carried on for him, together with those ostensibly conducting it, and when, therefore, he would stand in the position of principal towards the ostensible members of the firm as his agents."

I would also refer to the remarks of Lord Wensleydale at pp. 312 and 313 of the same report.

Now, a dormant partner is one who does not take an active part in the business, who is, perhaps, prohibited from so doing. He may be prohibited from acting as an active partner and binding his co-partners inter se, and still be liable at common law to the creditors as an ordinary partner. The agency test is not to be applied only as if he were the agent and the others the principals. It is to be applied in a case like the present in this way: has he, as principal, embarked his money in the firm, expecting to reap a profit, and left the active partners to invest it and venture it in the partnership transactions as his agents? If they, acting for him, enter into engagements from which a profit is expected, he, as principal, should be responsible. This, I think, is the proper way to apply the test of agency in the present case. In the ordinary partnership, there may be active members and also others who agree to take no part in the management. There may be clauses in the articles

of partnership imposing upon some of the members all the restrictions and disabilities imposed upon special partners by the clauses in the Partnership Act relating to limited partnership, and still such members are none the less members of the partnership, and liable as such to the creditors.

Upon the argument of the appeal, an objection was taken to the validity of the special partnership which does not appear to have been raised before the trial Judge. This new objection is that a part of the $4,000 to be contributed by Rosenthal was made up of cheques of third parties, and that there was no evidence that these cheques had ever been paid.

Section 62 requires special partners to contribute in actual cash payments a specific sum or specific sums as capital to the common stock. If the payments be not so made, then the certificate will be false, and by sec. 69 the special partner will be liable as a general partner.

Assuming the certificate to have been signed on 17th February, the payment must have been made on or before that date in order to comply with the Act. The evidence of Geller shews that the $4,000 contributed by Rosenthal was made up of three amounts paid in as follows: $1,000 on 13th February; $2,200 on 17th February; and $800 which the trial Judge finds was paid on 17th February, although credited in the books as of the 18th. The item of $2,200 was made up of a cheque of Rosenthal for $580, and two other cheques for $200 and $1,420 respectively, made by other persons, whose names were unknown. These cheques were deposited in the firm's bank on 17th February, but there is no direct evidence to prove that the cheques for $200 and $1,420 were ever paid. There is, indeed, evidence that on 18th February a cheque of one Genser, which had been given by Rosenthal to the firm, was dishonoured, was charged up to Rosenthal, and afterwards made good by him. The evidence, however, does not identify this as one of the two cheques above referred to.

The evidence on the part of the defence was unsatisfactory. Notwithstanding his deep interest in this matter, Rosenthal did not think it necessary to testify in his own behalf to prove the payment of the money. Perhaps his counsel considered it prudent to keep him out of the wit-

ness box. Parts of his examination for discovery were put in by the plaintiffs. His account given there as to how the payments were made differs materially from that given by Geller. If it were shewn that the cheques for $200 and $1,240 deposited on 17th February were paid in due course, I would be disposed to hold that it was sufficient compliance with the statute. Actual cash, no doubt, means that the payment must be made in money, not in money's worth, and a constructive payment would not satisfy these conditions. See Rex v. St. Nicholas, Rochester, 5 B. & Ad. 226. Cheques upon a bank may, however, be treated by parties as actual cash, and if the cheques are paid on presentation, they may become such in fact. I think it can fairly be presumed from the evidence that the cheques were paid.

Counsel for the respondent urged two objections on the appeal against the plaintiffs' right to recover. One was that the promissory note sued on was payable at a certain place, and presentment there was not proved. This point was not raised before the trial Judge, and I do not think it should be permitted on appeal, for the reasons given by Killam, C.J., in Proctor v. Parker, 12 Man. L. R. at p. 533.

The other objection was that the indorsement upon the bill of exchange was not proven. The trial Judge has, however, found as a fact that the plaintiffs are the lawful holders of the bill, and this finding must bind the defendant.

The questions raised in this appeal are of great importance. They are completely new so far as the Courts of this province are concerned. There is no similar statutory provision in England, and there are no Ontario cases quite in point. The American authorities, as often happens, are conflicting. I have great respect for the opinions of my learned brother from whom this appeal is brought; but I am compelled to differ from him in the conclusion at which he has arrived, as to the position of Rosenthal in regard to the debts of the firm. I think the appeal should be allowed with costs, and judgment entered in the Court below against all the defendants for the amount of the note and bill with legal interest and costs of suit.

MANITOBA.

HOWELL, C.J.A. JULY 8TH, 1907.

COURT OF APPEAL.

WATT v. DRYSDALE.

Municipal Corporations—By-law Prohibiting Animals from Running at Large — Trespass — Fences — Construction of By-law — Powers of Municipality—Derogation of Common Law Rights — Injury to Crops by Cattle at Large—Damages.

County Court appeal. The plaintiff claimed damages against the defendant for injury to a crop of grain by defendant's cattle.

At the trial, before RYAN, Co. C.J., it appeared that the parties owned parts of one section of land, and that the line fence between them was, by agreement, to be built by the parties contributing thereto, as follows: the plaintiff furnishing two strands of wire and the defendant the posts and one strand. The plaintiff furnished his proportion of material, but the defendant did not furnish his portion. There was no agreement or apportionment of the boundary fence between the parties, setting forth the parts which each was to erect or maintain. It was not the duty of either party to keep up any particular portion of the fence.

At the trial RYAN, Co. C.J., found the damages sustained by the plaintiff for the injuries to his crop by the defendant's cattle to be $50. He found also that at the time the cattle did this injury the line fence between the parties was not of the character required by the local by-law, and, holding the by-law good, he entered a verdict for the defendant, and the latter appealed.

The appeal was heard by HOWELL, C.J.A.

W. R. Mulock, K.C., for defendant.

A. Haggart, K.C., for plaintiff.

HOWELL, C.J.A.:—At the trial a by-law of the municipality was put in, the first and second paragraphs of which prohibit, under varying penalties, stallions, bulls, horses,

sheep, or pigs from running at large. The third paragraph provides that "stock of all descriptions, except those mentioned in the last preceding section, from a year old and upwards, must be kept in a yard, fenced pasture, stable, or other enclosure, from sunset to sunrise the next morning, from 1st June to 15th October," under certain penalties. And then appears this clause: "Said animals may be impounded, or owner prosecuted, at the discretion of the prosecutor."

The fourth and fifth clauses declare that no "breachy" animal shall be allowed to run at large.

The result is, then, that certain animals, set forth in the 1st, 2nd, 4th, and 5th paragraphs, are prohibited from running at large and from trespassing under any circumstances. By the 3rd paragraph certain other animals must be kept in an enclosure from sunset to sunrise, and the damage, I understand, was committed by animals of this class. Nowhere in the by-law is it declared that, except in the portion of the day above provided for, these animals may run at large.

Section 6 fixes a lawful fence to be one of three strands of barbed wire, with posts of certain dimensions and wires at certain distances apart.

Section 7 is as follows: "In case of any trespass being committed either with or without actual damage upon any property within the said municipality, by horses, mules, cattle, sheep, pigs, or other animals, it shall be necessary and shall be a condition precedent to the bringing of any action or suit for the said trespass or damages, that the owner of the said property trespassed upon, or the person otherwise entitled to bring such action, shall have complied with the provisions of this by-law, and shall have erected and maintained prior to and at the time of such trespass or damage, a lawful fence enclosing the property so trespassed upon, or damaged, and unless and until the owner of such property, or person entitled otherwise to bring such action, shall have complied with the provisions of this clause by the erection and maintenance of a lawful fence, as aforesaid, such owner or person shall not recover any damages, either nominal or otherwise, nor any costs of suit for such trespass, nor shall he be entitled to impound such animals under any by-law of the said municipality, except such animals come within the classes named in sections 2 and 3 of this by-law."

Apparently, the draftsman of this by-law thought that, according to the law of the land, the owner of domestic animals could permit them to wander over the country and trespass at their own will, and that he was simply called upon to draft a by-law to prevent this running at large and trespassing. The by-law carefully provides that certain animals shall not be allowed to run at large, but there is no provision, as above remarked, declaring that any animals may run at large. At common law the owner of cattle was bound to keep them from his neighbour's land, and the owner of lands was not required to protect his property from the depredations of wandering cattle: Garrioch v. McKay, 13 Man. L. R. 404; Crowe v. Steeper, 46 U. C. R. 89.

The latter part of section 7 of the by-law prevents the impounding of cattle under certain circumstances, but what the draftsman really intended by it, I am unable to understand. The draftsman of the by-law, having provided that certain animals should not run at large, then takes up the subject of what the plaintiff's remedies are in case animals which, amongst others, are by the by-law, in direct terms, prevented from running at large, have trespassed upon or destroyed his property, and that section in the clearest language provides and declares that, although the defendant's animals are, contrary to law, running at large, and are distinctly trespassers, the plaintiff cannot recover unless he has kept up a fence. The by-law evidently contemplates by this section that the owner of land owes a duty to the general public to fence, and this applies as well to fences along highways as to line fences.

At the trial the defendant relied upon this by-law as an authority permitting his cattle to run at large and trespass, and I gather from the judgment of the County Court Judge that he also considered it a by-law allowing animals to run at large. I cannot agree with this construction of the by-law. I think, at most, it must be looked at as a by-law restraining animals from running at large. There is certainly no declaration in the by-law allowing any animals to run at large at any time.

The 7th section of this by-law requires consideration. It seems to me exceedingly strange that a by-law should be passed declaring that, although no cattle can run at large, yet the owner of land must fence against animals palpably trespassers. It is claimed that authority for passing sec. 7 of this by-law is to be found in sec. 644 (*d*) of the present

Municipal Act. This sub-section had its origin in an amendment to the Municipal Act passed in 1892, ch. 25, sec. 19, in which statute it was inserted as sub-section (*a*) to sec. 601 of ch. 100 of R. S. M. 1892. The right to pass a by-law respecting animals running at large, under which this by-law was passed, is granted by sec. 601 (*c*) of the last above-mentioned revised statutes, and that statute simply permits a municipality to pass a by-law allowing, restraining, and regulating the running at large, or trespassing, of any animals. Assuming then that at the time this by-law was passed, all the laws above-mentioned were in force, can it be held that as against the trespassing of animals which are not permitted to run at large the owner of land must fence? And is it clear that the legislature intended to authorize municipalities to pass by-laws restraining actions for trespass by owners of land where damage has been done by cattle which are not permitted to run at large? From the view of the law that I have taken in another branch of this case, it is not necessary to decide this question, and not necessary to decide whether the legislature intended to throw a public duty on the owner of land to fence, although the common law duty of the owner of cattle remained the law.

At the time when this by-law was passed, sub-sec. (*o*) of the statute of 1892—continued in sub-sec. (*d*) of sec. 644 of the present Act—was not in force, it having been passed prior to the enactment of this statute. The only power authorizing the municipality to pass this by-law at the time it was passed was R. S. M. 1892 ch. 100, sec. 601 (*e*); sec. 597 (*d*) and (*e*), and ch. 12 of the same R. S. M., secs. (4) (5) and (6).

The first sub-section above referred to simply allows a municipality to pass a by-law allowing, restraining, and regulating the running at large, or trespassing, of any animals, and providing for impounding them and for selling them in case of non-payment of damages, fines, and expenses, and for appraising the damages. The remaining sections and sub-sections above referred to allow a municipality to pass a by-law regulating and declaring what a lawful fence shall be and for apportioning the costs thereof between the parties. In no place in the statute is there any authority to a municipality to in any way restrain an action of trespass. The power of the municipality to pass a by-law in derogation of common law rights by a legislature is always read with great strictness. Before such a power will be inferred,

it must be found granted in clear language. In this case there is no by-law permitting the defendant's cattle to run at large, and I cannot think that the legislature ever intended by any of the statutes above referred to to give the municipality power to simply restrain an action of trespass (although the cattle were not allowed to run at large) unless the plaintiff proved that he had fenced his property; and what seems still stranger, apparently he must put up all the fence himself, although plainly the defendant, as in this case, was in default according to their own agreement. I cannot think the legislature intended to grant any such power as this. It is argued that the subsequent legislation ratifies or legalized this by-law. I cannot agree with this view; indeed, I would draw the contrary conclusion, and, in this respect I am not singular. See Taylor v. Winnipeg, 11 Man. L. R. 420; King v. Nunn, 15 Man. L. R. 288. There is ample authority also for the proposition that the power of a municipality to pass by-laws restricting common law rights can only be found in language clear and distinct. See the cases above cited and Merritt v. City of Toronto, 22 A. R. 205.

The County Court Judge very properly found the damages, so that justice can be done by allowing the appeal, setting aside the verdict for the defendant with costs, and entering a verdict for the plaintiff for $50, with the costs of this appeal and costs of the trial below. If any counsel fee was allowed by the Judge to the defendant at the trial, the same fee should be allowed the plaintiff on his taxation of costs.

Appeal allowed.

MANITOBA.

MATHERS, J. JULY 8TH, 1907.

SINGLE COURT.

BLACK v. WINNIPEG ELECTRIC R. W. CO.

Street Railways — Contract with Municipal Corporation — Construction of Loop Line — Authority — Resolution of Council — Necessity for By-law—Board of Control — Adoption by Council of Report of — Engineer's Approval of Plan — Conditional Approval of Council — Condition Precedent—Injunction.

Plaintiff was a ratepayer in the city of Winnipeg, and had an interest in land on the north-east corner of Lom-

bard avenue and Main street. The statement of claim alleged that defendants the Winnipeg Electric Railway Co. proposed to construct a loop line on their railway on Lombard avenue, Rorie street, and McDermot avenue, and pretended that they had obtained permission of the other defendants, the corporation of the city of Winnipeg, to construct the same. Plaintiff alleged that the Winnipeg Electric Railway Co. never received any valid lawful authority to construct the loop. The council of the corporation of the city of Winnipeg, acting on a report of the board of control passed on 28th June, 1907, purported to grant defendants the Winnipeg Electric Railway Co. permission to construct the loop line, but the plaintiff alleged that in so doing the council acted wholly without due consideration and without legal authority, and its action in this respect was wholly ultra vires of the corporation. The report of the board of contral provided that defendants the Winnipeg Electric Railway Co. should construct a second loop line for the north-end cars on Graham avenue, Fort street, and St. Mary's avenue, and that the construction of the last named loop line should be a condition precedent to the right of the Winnipeg Electric Railway Co. to construct the first-mentioned loop line on Lombard avenue, Rorie street, and McDermot avenue. The defendants the Winnipeg Electric Railway Co. never constructed nor attempted nor commenced to construct any loop line on Graham avenue, Fort street, and St. Mary's avenue. The approval of the city engineer had not been given for the construction of the first-mentioned loop line, which was required by the by-laws and by the statute. Plaintiff alleged that if the loop line on Lombard avenue, Rorie street, and McDermot avenue, was constructed, the business and property of the plaintiff and other persons owning property on a portion of such highways would be greatly injured, and that the plaintiff would suffer great loss and damage by reason of the construction of the loop line.

The Court was asked to declare that the defendants the Winnipeg Electric Railway Co. had no legal power or authority to construct or commence the construction of the first-mentioned line, and for an injunction to restrain them from constructing the same; that the corporation of the city of Winnipeg, their officers, servants, agents, and workmen, might be restrained from in any way authorizing the Win-

nipeg Electric Railway Co. to construct or commence the construction of the loop line.

A motion was made to continue an interim injunction which had been granted.

A. J. Andrews and H. A. Burbidge, for plaintiff.

J. H. Munson, K.C., and D. H. Laird, for defendants the Winnipeg Electric Railway Co.

T. A. Hunt, for defendants the corporation of the city of Winnipeg.

MATHERS, J.:—The continuance to the hearing of the interim injunction granted by me is urged upon several grounds.

In the first place, it is argued that the board of control had no jurisdiction to deal with the defendants' application for leave to construct the loop in question, and, as the consent of the council is expressed only in a resolution adopting the favourable report of that board, the whole proceeding is a nullity. It seems to me, however, that, whether or not the board of control had any power to deal with the matter, the question, in effect, upon which the council was called upon to vote was as to whether or not the application of the defendants to construct this loop should be granted. By a favourable vote upon the report submitted, the council meant to approve of the defendants' application. In my opinion, it was immaterial whether the matter originated with the board of control, or the board of works, or in what particular form the approval was expressed, so long as the members of the council perfectly understood, as I have no doubt they did, the effect of an affirmative vote on the resolution submitted. I am, therefore, of opinion that the plaintiff's first point fails.

I also think that the objection founded upon sec. 31 of the by-law regulating the procedure of the council also fails, as it does not appear that any objection was taken to the discussion of the resolution, without previous notice having been given.

It was further argued that the consent of the council must be expressed by by-law, and not by resolution. Section 472 of the Winnipeg charter provides that "the powers of the council shall be exercised by by-law when not otherwise authorized or provided for."

In support of this objection Liverpool and Milton R. W. Co. v. Town of Liverpool, 33 S. C. R. 180, was cited and relied upon. It does not appear to me, however, that that case is an authority either for or against the plaintiff, as it turned upon the wording of the Act then under consideration. The Court held that certain regulations passed by the town of Liverpool should have been by by-law instead of resolution, because, as pointed out by Mr. Justice Armour, at p. 191, the Act had conferred upon the town the power to pass by-laws for making such regulations, and such power, so conferred, impliedly excluded the power to make such regulations otherwise than by by-law. In Pembroke v. Canada Central R. W. Co., 3 O. R. 503, Osler, J., expressed the opinion that sec. 277 of the then (1882) Ontario Municipal Act, which is the same as sec. 472 of the Winnipeg charter, must be construed as referring to the exercise of the powers of the council under the Municipal Act, and not to powers which may be exercised under a special Act passed for other purposes. He did not, however, dispose of the case upon that ground, but reserved the right to more fully consider the effect of that section should proceedings be taken against the defendants in another form. In Port Arthur High School Board v. Town of Fort William, 25 A. R. 522, the Ontario Court of Appeal held that high school trustees could be legally appointed by a resolution of the council. In that case the legality of the appointment was being questioned, something like 12 years after thay had been first appointed, and acted in office, in an action by Port Arthur high school trustees to recover from Fort William the statutory allowance for pupils of the latter town attending the high school in the former town, during the 12 years previous. Besides, it was pointed out that the appointments of trustees are made every year, and from year to year, and there seemed no special reason why corporate action should not be manifested by resolution.

A case much more in point is City of Toronto v. Toronto R. W. Co., 12 O. L. R. 534, 8 O.W.R. 179, where the Court of Appeal held that an approval, such as is given here, may be by resolution. In the absence of these authorities, I think I should have had no hesitation in holding that the question of the council's approval of the location of a line of railway upon a city street should be manifested by by-law. The case of City of Toronto v. Tornto R. W. Co.,

however, seems to be directly in point, and I think I should follow it.

The next objection raised by the plaintiff is that the engineer has not approved of the plan which was approved by the council.

The application to the council was for a loop line on Lombard avenue, Rorie street, and McDermot avenue, with a double back on McDermot avenue, all of which is shewn upon the plan accompanying the application. This application was approved by the city council. The city engineer has approved the plan, except as to the double back on McDermot avenue. By sec. 2 of by-law 543, validated by 55 Vict. ch. 56, the defendants must, before entering upon any street, except certain streets therein named, to construct a line of railway, make application for permission to do so, and before in any way proceeding with the work shall receive the approval of the city council. By sec. 2 (*a*) construction shall not be commenced until a plan shewing the location on the street, position, and style of track, roadbed, etc., shall have been submitted to and approved by the city engineer. Section 1 of the by-law gives the company the right to construct and operate double and single track railways, and, with the consent of the council, to change from double to single tracks and vice versa, with the necessary side tracks, switches, etc. In applying to the city council for permission under sec. 2, it is not apparently necessary that a plan of the proposed line should be submitted. All that it is necessary to do is to obtain the consent and approval of the council to the construction of a line of railway along or across certain named streets. The working out of the details is left to the city engineer. To him a plan must be submitted shewing the position and style of track, roadbed, rails, poles, etc., and his approval thereof obtained. It seems to me that is the proper construction of the first three sections of this by-law. To the council is left the question of whether or not a street shall be occupied by a railway, but, once having decided that it shall, the question of the number and location of switches and all other details is left to the decision of the city engineer. It seems to me, therefore, that the objection that the council has not approved of the omission of the switch on McDermot avenue fails. If it were shewn that in granting the permis-

sion to construct this loop the council was probably influenced by the fact that a switch on McDermot avenue was shewn on the plan, different considerations would arise, but I think the onus was on the plaintiff to shew this.

It was also objected that the approval of the council was a conditional one, and that the council had no power to do this. I cannot, however, give effect to this objection. It seems to me the council would have a right to impose any terms it saw fit as a condition of allowing the construction of a line on any street. The condition imposed is the construction of a loop on Graham and Fort streets. It is argued that the performance of this latter condition is precedent to the right to enter upon the streets under consideration. The question of whether or not such was the case, depends upon the intention of the parties. I cannot infer either from the wording of the condition, or the surrounding circumstances, that it was so intended. It is said there will be no means of enforcing the condition, if it is held to be subsequent. That, however, is not a ground upon which the Court can interfere. It may be that the council has not acted wisely in not having the agreement made put in such form that there would be no doubt about the right to enforce it, but that is a matter with which the Court, on this application, has no concern. The proper attitude for the Court, as pointed out by Lord Chancellor Hatherley in Attorney-General v. Colney Hatch, L. R. 4 Ch. 147, "is to ascertain the exact state of the law which regulates the relation of parties, and having done so, to proceed to act upon it without reference to the difficulties of the case, on the part of those against whom it is obliged to decide."

Having given the matter the best consideration possible in the short time at my disposal, I am of opinion that I would not be justified in continuing this injunction. I dismiss the application, reserving to the plaintiff, however, the right to renew the application, should a state of facts arise that, in the opinion of counsel, would justify the motion.

Costs will be reserved to the trial.

MANITOBA.

MATHERS, J. JULY 11TH, 1907.

TRIAL.

DOUGLAS v. FRASER.

Husband and Wife — Business Carried on by Husband in Name of Wife — Stock in Trade Seized by Execution Creditors of Husband—Married Women's Property Act —Construction—Earnings of Married Woman—Investment in Land—"Property"—Profits of Business—Burden of Proof — Evidence — Stock Paid for Largely by Husband's Money—Interpleader Issue.

An interpleader issue, directed to try whether a certain stock of furs seized by the sheriff of the eastern judicial district, as belonging to John S. Douglas, was the property of his wife, Ann Douglas, plaintiff in the issue, as against Donald Fraser & Co., execution creditors of John S. Douglas, defendants in the issue.

I. Pitblado and D. W. McKerchar, for plaintiff.

T. M. Daly, K.C., and W. M. Crichton, for defendants.

MATHERS, J.:—On 24th December, 1906, the defendants in the issue recovered a judgment in this Court against John S. Douglas for $1,168.10 and $931.25 and costs of suit, amounting in all to $2,489.22. The debt on which this judgment was recovered was incurred in 1895. In that year John S. Douglas failed in business, and made a general assignment for the benefit of his creditors, but nothing was received by the defendants on account of their claim. About 1st October, 1899, business was opened in the name of the claimant, Anna Douglas, under the style of "Douglas & Co.," and a declaration under the Partnership Act was filed a short time afterwards on her behalf. From the beginning John S. Douglas, her husband, managed the business. He rented the premises in which the business was carried on. It was he who did all the buying and selling for the concern. He accepted and paid any drafts drawn on Douglas & Co.; and he re-

ceived and banked and chequed out all the moneys that came in. In short, he had the entire control and management of the business. He kept such books of account as were kept, and the only part that the claimant took in the business was in superintending the work room, in which she herself worked. Prior to his failure in 1895, John S. Douglas had been in both the fur and the boot and shoe business, and, although the claimant had worked in the making of furs at her home, she had not, up to that time, worked in the shop or taken any part in the management of the business. The business, at the beginning, was very small, consisting largely of repairing and making up furs to order, and was conducted in one room upstairs, for which the rent paid was $15 a month. It has since grown to much larger proportions, and at the time of the seizure the total value of the stock on hand was over $5,000.

It was admitted by counsel for the claimant at the trial that this business was not a business carried on by the claimant separately from her husband, within the meaning of that expression in sub-sec. (b) of sec. 2 of the Married Women's Property Act, but he contends that the property in the goods was, nevertheless, her property.

The claimant and John S. Douglas were married in 1886, and afterwards came to Winnipeg. She alleges that at the time of her marriage she had about $500, which she had earned from teaching school in the State of New York at $7 a week. She had taught for two years during 10 months out of each year. Her story is that she did not spend any of this money, and at the time of her marriage she had it in cash, and that she carried it with her in cash while on her honeymoon trip, and until she arrived in Winnipeg; that after her arrival in Winnipeg she gave it to her husband to invest for her. He says he took this money and deposited it to his own credit in his own bank account, but kept a separate account of it. It was used in his business for over 6 years until 1892, and he then bought some property with it; that in the meantime he had allowed her bank interest at 3 per cent. The book in which he says entries of this money were made, was burned in a fire which he had in 1893. From 1893 until the time of his failure he says he also kept the rents and income of the several properties hereafter referred to in a book which was handed over to the assignee at the time of his assignment, but he appears to have made no attempt to produce it. He says he

bought property first on Jarvis street or Gunnell street, he does not know which. For the Jarvis street property he paid $500 as a first payment and the Gunnell street property $250. On the Gunnell street property he says there was a surplus of about $60 a month in the rents, and there was also a surplus in the Jarvis street property. The Gunnell street property was afterwards abandoned as not worth keeping, as was also the Gomez street property, which was also, he says, bought with his wife's money. Out of the rents received from Gunnell, Gomez, and Jarvis street properties he subsequently bought a property, he says, on Young street, for $300, on which he erected a house at a cost of about $3,000, borrowing the entire cost of the house by way of mortgage on the property. The claimant herself says there was very little, if any, surplus from the rents of the Jarvis street property up to the time of the failure, that practically all was absorbed in repairs and outgoings. I have no doubt that that statement is true. I have no doubt also that there were no surplus rents from either the Gunnell or the Gomez street properties, otherwise they would not have been abandoned as not worth keeping. The Jarvis street property was bought and taken in the name of John S. Douglas, but was in February, 1893, transferred to the claimant by him, in consideration of natural love and affection. The Young street property was also bought in the name of John S. Douglas, and was subsequently in February, 1893, transferred by him to the claimant, for the same consideration. That property was sold, and out of the proceeds was bought a lot on the corner of Carlton and Graham streets, on which a block was erected, which yields a net rental of about $500 a month. The Jarvis street property was sold in 1900, yielding a net equity of about $1,300. The claimant says that after her husband's failure she assumed the collection of the rents for the Jarvis street property, and that her husband's father made her a weekly allowance of $15 a month up to the time of his death in 1900; that in the year 1898 she earned something over $100 as an agent for the London Life Insurance Company, managed by one Dickson; and that out of these various sources of revenue she had saved, in the beginning of 1899, $432.74. The money she had saved she says she handed to Mr. Dickson, manager of the insurance company, for safe-keeping. He was called as a witness, and his diary, containing the entries, beginning with 1899, was produced, but he says he could not find the diary containing

the entries of 1898. He received and paid out various sums of money until on 28th September, 1899, he had only $32.38 on hand.

When the Jarvis street property was sold, the claimant was not in Manitoba, and the business was transacted by John S. Douglas; he received the proceeds and handed them to Dickson, who entered the sum in a diary produced. The page of the diary in which this and various other sums are entered is headed "Received from John S. Douglas in trust." Under date of 9th May the first entry is $1,300. The account runs on with various sums paid out and received—the amount being at one time reduced to the sum of $250.95, and afterwards increased until 31st December, when the balance on hand was $1,175. Under the heading "Received from John S. Douglas in trust" are written in a different pencil the words "For Anna Douglas." Dickson admitted on cross-examination, though with apparent reluctance, that these words were written by him recently, and just before this action was about to come on for trial. He further states that he wrote these words in at the suggestion of John S. Douglas; the latter in the witness box denied that he knew anything about these words having been written in, or that he gave any instructions to have that entry changed. I have no hesitation in accepting the statement of Dickson that Douglas did request him to alter this entry, and that he did it for the purpose of endeavouring to deceive the Court and of making evidence for use in the trial of this issue. The diary subsequent to 31st December, 1900, is not produced, and it is stated that it cannot be found, but certain cheques produced shew that cheques were being paid by Dickson to Douglas & Co., or to Douglas, as late as 1902. Up to this time Douglas & Co. had no bank account, and apparently Dickson acted as banker.

When the claimant was examined for discovery she was asked what money she had when she was married, and she could not answer. Asked if she had as much as $100, she said "she could not put it down as hard as that." I do not believe her story that she brought $500 with her in cash to Winnipeg or any sum like that. Her story bears the ear-marks of improbability. I believe that the properties bought by John S. Douglas in her name, or in his own name, and subsequently transferred to her, were bought with his own money. I refuse to accept his statement that she gave him about $500, and that, although he used that

in his own business for 6 years, he kept any account of it, or that he bought the several properties with her money. I find that the Jarvis street property was bought with his money, and that he so intended, and that in February, 1893, he made a gift of this property to the claimant.

The question then of whether or not she owned this property when it was sold in 1900 is important, as the business was largely started on the proceeds of the sale of this land. Her husband made a gift of it to her in 1893. So far as appears by the evidence, he was not then in financial difficulties. After the fire, which occurred two months later, all his creditors were paid. Except as against creditors then existing or in anticipation when the transfer was made, he had a right to make this gift: Parker on Frauds, p. 71. It was suggested that this transfer was made in anticipation of the fire, but there is no evidence that the fire was not an honest one. I cannot see any evidence that it was made in anticipation of his subsequent failure, in 1895.

Section 5 of the present Married Woman's Property Act provides that all property standing in the name of a married woman when that Act came into force shall be deemed to be her property until the contrary is shewn. That Act came into force on 21st May, 1900, but several days prior to that John S. Douglas had sold the Jarvis street property, received the proceeds, some $1,300, and deposited the same with a trustee in trust for himself, so that, when the Act came into force, neither the land, nor the proceeds from its sale, was standing in the name of the claimant. Therefore, so far as this property is concerned, the claimant can get no assistance from this provision of the statute. Her right to this property depends upon the provisions of the previous Act, R. S. M. 1892 ch. 95, sec. 2 of which gives a married woman, who married after 14th May, 1875, without a settlement, the right to hold property as a femme sole, subject to the concluding words, "But this section shall not extend to any property received by a married woman from her husband during coverture." A similar provision in the Ontario Married Woman's Property Act, when read with another section of the same Act, has been construed to mean that a married woman may, notwithstanding the exception quoted, hold property transferred to her by her husband during coverture as against his creditors, unless the transfer was made for the purpose of defeating them: Shuttleworth

v. McGillivray, 5 O. L. R. 536, 2 O. W. R. 250. Owing to the differences between the Ontario Act and the previous Manitoba Act, I do not think that case is any authority on the construction of the latter Act; but if the Acts were the same I should hesitate to follow that case. It seems to me the plain reading of the language quoted is that where property has been received by a married woman from her husband during coverture she cannot invoke that section in support of her title to it, but that she must rely upon her common law rights only. By sec. 21 of the old Act, her husband might make a valid transfer to her without the intervention of a trustee. When that was done, it became her property, subject to his common law rights in it.

At common law the husband took a freehold interest in his wife's real estate. Before the birth of issue, that interest lasted only during their joint lives, but after the birth of issue capable of inheriting he became entitled to a freehold interest during his life, which enabled him to hold after the death of his wife. This latter interest was called a tenancy by the curtesy: Eversley on Domestic Relations, 3rd ed., p. 184. By R. S. M. 1892 ch. 95, sec. 15, the husband's tenancy by the curtesy of his wife's lands is abolished, so that at common law, in Manitoba, the husband's interest in his wife's lands would only endure during their joint lives. During that time, however, he had an absolute disposing power over it without his wife's consent, and could, by a conveyance executed by himself alone, absolutely convey the whole freehold during their joint lives: Robertson v. Morris, 17 L. J. Q. B. 201.

It appears, therefore, that John S. Douglas had a freehold interest in the Jarvis street property at the time it was sold. He had not the entire interest, but he and the claimant were jointly seised in her right: MacQueen on Husband and Wife, 4th ed., p. 59. A portion of the proceeds upon a sale would, as of right, belong to him. Upon the data before me it is impossible to apportion the selling price between them. He would be entitled to such proportion of the price for which sold as would represent the value of the property during the joint lives of himself and wife.

The claimant had saved a sum of money which she had deposited with Dickson for safe-keeping. On 16th January, 1899, that sum amounted to $447.33. From that time

forward, the amount on hand had gradually become reduced until on 4th July, it was only $77.61, and on 28th September it was $32.28. The claimant says she began business on 1st October, 1899, with the moneys so saved. She says that, before the store was actually opened, money had to be spent in procuring working utensils, skins, etc., and it is probable that some, if not all, of the money was spent in that way. The money saved was, she says (with the exception of about $125, earned as agent of Mr. Dickson's life insurance company), the proceeds of rents from the Jarvis street property. The rents of that property, however, belonged to her husband, and not to her, as at common law he was entitled to the rents of her property: Eversley on Domestic Relations, p. 186.

It would appear from this that the business was started in October, 1899, with money, all of which was the husband's, except about $125, and in May, 1900, the capital was augmented to the extent of $1,300, a large portion of which was also his.

When the claimant commenced business as Douglas & Co., her husband, John S. Douglas, had judgments against him, so that he could not begin in his own name. At first cash was paid for goods bought, but in 1903 credit was given. A number of the wholesale men who sold goods to Douglas & Co. on credit were called as witnesses. They all say that they sold the goods to the claimant, and upon her credit, and they would not have sold upon credit to her husband because of the liabilities hanging over him. I have no doubt but that such is the fact, and that each of the dealers who extended credit to Douglas & Co. knew that the claimant was trading in that name, and that it was to her the goods were sold.

The business of Douglas & Co. prospered from the beginning, and the profits made in the business were used in buying other stock and in generally extending and enlarging it.

The word "property" in the present Married Woman's Property Act is defined as meaning "any real or personal property of every kind and description of a married woman, whether acquired before or after the commencement of this Act, and shall include the rents, issues, and profits of any such real or personal property; and includes also . . . all wages, earnings, money, and property gained or

acquired by a married woman in any employment, trade, or occupation in which she is engaged, or which she carried on separately from her husband and in which he has no proprietary interest," etc.

Mr. Pitblado admitted that the business of Douglas & Co. was not a trade or occupation carried on by the claimant separately from her husband, within the meaning of the above quoted section: but he contended that the opening words of the section defining property as "any real or personal property, of any kind and description, of a married woman," included every possible kind of property, and were not narrowed or limited by what follows them. He further argued that if the opening general description is limited or controlled by the subsequent particular description, the words "money and property" are ejusdem generis with "wages" and "earnings," and mean money and property acquired as wages and earnings, and not from an investment of the proceeds of goods sold, or of the profits of the trade.

From the 1st October, 1899, until 21st May, 1900, the business was carried on under the old Act, R. S. M. 1892 ch. 95. It follows from Mr. Pitblado's admission that the profits of the business, if any, at least up to the coming into force of R. S. M. 1902 ch. 106, belonged to John S. Douglas. Up to that time the business had been very small, and the profits, if any, would not amount to very much. The claimant says the business was prosperous. I infer she meant that it was prosperous from the beginning. During the 7 months and over before the new Act came into force, there would be some profit, all of which belonged to her husband. The living expenses of the claimant and her husband were, however, paid out of the business, and it is now impossible to say whether or not there was any profit left to invest in new goods. Subsequent to the coming into force of the new Act there must have been very considerable profits, because at the time of the seizure the stock on hand was appraised at $5,745,35, and the highest amount the liabilities were put at then was $3,600, all of which had been paid off at the time of the trial. In 1903 the business had so far advanced that they were able to buy on credit. To whom did the profits of the business after May, 1900, belong?

The question is by no means free from difficulty. The expression "property" is defined to mean any real and personal property of every kind and description . . . and includes "all wages, earnings, money, and property gained

or acquired by a married woman in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, and in which her husband has no proprietary interest."

This is clearly not a trade or occupation which she carries on separately from her husband, and it was not contended by the claimant's counsel that it was. If the trade were separate, by the Act the money or property gained or acquired in it would be hers. As the trade is not separate, such money and property is not hers, but her husband's, unless they are included within the opening general words "real and personal property of every kind and description."

In King v. George, 5 Ch. D. 627, it was held that the bequest of property was not limited by a subsequent particular description. The decision in that case went on the ground that there was nothing from which even a conjecture could be formed as to what the real intention of the testatrix was. The language of the will was "all that I have power over, namely, plate, linen, china, pictures, &c.," omitting from the particular enumeration an important part of her property. The contest there was to whether or not the bequest should be confined to the specifically named kinds of property. In the case at bar it is something akin to the converse proposition we have to deal with, namely, does the special mention of property acquired by a separate trading exclude from the previous general description property acquired by a trade which is not carried on separately from her husband. I think it does. I can assign no other reason for the use by the legislature of the restrictive language here used than that they meant that money and property acquired by a married woman by trading in conjunction with her husband should be his, and not hers.

The expression used in the Act, "money and property gained or acquired," is wide enough to include the corpus of the stock bought by the claimant, as such stock clearly consists of "property acquired by her." I think what the legislature meant to protect was the wages and earnings of a married woman, and the money and property she gains or acquires by trade or occupation; in other words, her accumulations or accretions from trade or occupation, whether such accumulations consist of money or property, as distinguished from the stock in trade or property by the use of which such accumulations were gained. It appears to me, therefore,

that the words "money and property" are in a sense ejusdem generis with the words "wages and earnings," in that the latter refer to her personal earnings, and the former to her earnings in trade, or, in other words, her profits, whether these profits are for the time being represented by property in which her gains have been invested, or money.

As this, however, was not a separate trading, all such money and property would belong to her husband.

I therefore find that the profits of the business of Douglas & Co. were the property of the judgment debtor.

This, however, does not dispose of the question of the ownership of the goods seized. In Meakin v. Samson, 28 C. P. 355, it was held by Hagarty, C.J., and Gwynne, J., that where the plaintiff, the wife of an undischarged bankrupt, carried on business in such a manner as the business of Douglas & Co. was carried on, under the husband's exclusive management, but to which neither husband nor wife originally contributed any capital, the stock having been supplied by certain of the husband's creditors on the wife's credit, the goods did not belong to the wife as against the husband's execution creditors, but that the whole thing was a device to enable the husband to carry on business in the wife's name. From this view Galt, J., dissented, holding that, as the goods had been sold to the wife and upon her credit, they were hers, and that the trading was a separate trading by the wife.

The same question came again before Galt, J., in Dominion Loan and Investment Co. v. Kilroy, 14 O. R. 468. This was an interpleader issue in which the plaintiffs were execution creditors of Thomas E. Kilroy, and the defendant in the issue was his wife. The debtor had failed in business, and had become insolvent. The plaintiff had recovered a judgment against him for a trade debt incurred before his insolvency. About 3 years after his failure the debtor made an arrangement with a firm of wholesale dealers to furnish the defendant with goods upon her own credit and responsibility. The debtor had a power of attorney from his wife, and managed the business for her. She had no capital whatever at the time the goods were purchased. The premises in which business was commenced were owned by her husband, and she neither paid rent nor agreed to pay any, but at the time of the seizure the business was carried on in premises rented by her in her own name. Galt, J., following his own dissenting

judgment in Meakin v. Samson, found the property was that of the defendant. Upon appeal to the Divisional Court the judgment was sustained by Cameron ,C.J., Galt and Rose, JJ., the latter doubting, but not dissenting.' In his opinion the business was not a separate business, and if the profits were invested in any property which his creditors could reach, her claim would not avail against the creditors. If it were shewn that the profits were paid to merchants for new goods sold to the wife, he thought the goods so purchased could be taken by the husband's creditors. He further was of opinion that if the profits could not be protected by the wife's claim there should be a reference to the Master to take an account, and the husband's interest should go to his creditors.

In the Court of Appeal (S.C., sub nom. Dominion Savings and Investment Society v. Kilroy, 15 A. R. 487) Burton and Patterson, JJ.A., adopted the reasoning of Galt, J., in Meakin v. Samson, that the goods having been sold to the wife, and upon her credit, they were her goods. Osler, J.A., thought the business was not carried on by the wife at all, but by her husband in her name, but held that if the goods were sold to the wife the husband was not the purchaser, and under the form of the issue the plaintiff could not succeed. He adds: "If it had been shewn that the goods had been actually paid for, a different question would have arisen—namely, whether they had been so paid for out of the proceeds of the trade, which, as I have said, clearly belong to the husband."

The judgments in that case of Burton and Patterson, JJ.A., were approved and followed by my brother, the Chief Justice of Manitoba, in Doll v. Conboy, 9 Man. L. R. 185.

It may be mentioned that in the Kilroy case and Doll v. Conboy the execution creditor appears to have ben plaintiff in the issue; while in the present case the claimant is the plaintiff; although that question is probably not material, owing to sec. 5 of the present Married Woman's Property Act, R. S. M. 1902 ch. 106. The goods were certainly in her name, and are, therefore, to be deemed hers until the contrary is shewn. Have the execution creditors shewn the contrary, for the onus is upon them? They have shewn that the money which started the business was largely the debtor's, but that the claimant contributed some. They have shewn that all the profits earned in the business were the debtor's.

It is shewn that there were considerable profits, but it is not clearly shewn what was done with these profits. I think I can fairly infer that the surplus, after paying household expenses, went back into the business. It is shewn that at the time the seizure there was a considerable sum owing in respect of the goods seized, which has since been paid. The latter fact cannot be considered, as, by the issue, the ownership is to be determined as of the time of the seizure.

The whole business was managed by the husband—under the guise of a power of attorney, it is true—but with as large discretionary power as if it was his own. All goods were bought by the debtor in the name of the claimant, and on her credit, but were paid for largely, if not entirely, by his money.

From these facts it seems to me the conclusion is irresistible that, as Osler, J.A., said in the Kilroy case, "it was simply a business not carried on by her at all, but by her husband in her name." When goods were sold to her by dealers, the property passed from them to her, but she held simply for her husband, who was the real and beneficial owner of the goods. In the Kilroy case and Doll v. Conboy it did not appear that any money belonging to the husband was invested in the business. The absence of that important fact sufficiently, in my opinion, distinguishes those cases from the one at bar.

I have considered the question of the rentals of the Graham street block, which were said to have been paid into the Douglas & Co. account. Even if these rents belonged to the claimant, a question on which I entertain very considerable doubt, the judgment debtor's collection of and use of them in the business would not make it any the less his business.

If the goods were really the husband's, though nominally those of the claimant, they were liable to execution at the suit of his creditors.

There will be a verdict for the defendants in the issue, with costs.

MANITOBA.

MATHERS, J. JULY 12TH, 1907.

TRIAL.

CAIRNS v. DUNKIN.

Vendor and Purchaser—Contract for Sale of Land—Construction — Ambiguity — Inability of Vendor to give Possession—Rescission by Purchaser—Return of Part of Purchase Money Paid — Damages — Stock and Plant Purchased for Use upon Land—Not in Contemplation at Time of Contract.

Action to rescind an agreement entered into for the purchase and sale of a half section of land in the Carman district, which defendant owned, and which was sold by his agent, Honeywell, to plaintiff. The difficulty between the plaintiff and the defendant arose over the wording of an agreement which was drawn up by Honeywell, and which contained ambiguous clauses. One provided that the plaintiff was to have immediate possession of the farm upon the completion of certain payments by him; and another stated that he was to be at liberty to go on the property for the purpose of ploughing it in the fall, and that he was to obtain possession at the expense of the vendor. When the time arrived for the taking of possession, which plaintiff asserted that he was entitled to under the agreement of sale, he visited the place and found a tenant named Hatton in possession under a lease for 3 years from defendant, made before the present bargain was entered into, but subject to cancellation upon the giving of 6 months' notice, which, up to that time, had not been given. Hatton refused to vacate the place. As soon as that fact was brought to the notice of defendant, the necessary notice was given to Hatton, but plaintiff refused to go on with the contract, contending that he was entitled to full possession of the land and buildings and not merely a part possession, for the purpose of doing the fall ploughing. Plaintiff alleged that he had been put to considerable loss and inconvenience by not being able to move on to the land in the fall of 1906, for which purpose he had purchased horses and made all

preparations. Besides asking to have the agreement set aside and his deposit returned to him, he claimed compensation for the damages sustained. Defendant maintained that plaintiff was merely to be permitted to go on the land in order to do his fall ploughing, and that he (plaintiff) was to secure possession for the former tenant, which he did not do.

A. C. Galt, for plaintiff.

J. H. Agnew, for defendant.

MATHERS, J:—This action is one of a class, all too numerous, which are caused by the parties intrusting their business, in the beginning, to a person entirely unskilled in conveyancing. Had the draftsman's purpose been to produce a document hopelessly contradictory and unintelligible, the agreement in this case might be regarded as a triumph of his art.

The action is for the cancellation of an agreement made on 21st July, 1906, to purchase a half section of land and for the recovery of $1,600 paid on account of the purchase money, and for damages, on the ground that the purchaser was not given possession for the purpose of ploughing the land in the fall of that year. At the time the agreement was entered into, there was a tenant in possession, whose tenancy could be cancelled on 6 months' notice. The plaintiff knew that a tenant was in possession, but did not know the terms of the tenancy.

In the receipt given for the first payment, the vendor's agent inserted the words "possession according to the existing lease in the fall of 1906." One clause of the agreement provides that the purchaser shall accept the vendor's title to the land. If no representation had been made as to the terms of the lease, I am of opinion that the purchaser would have been held to a knowledge of its contents, but the statement in the receipt that possession would be given pursuant to the terms of the lease, in the fall of 1906, absolved him from further inquiry under the authority of Cox v. Coventon, 31 Beav. 378. The title the purchaser was bound to accept was one subject to a lease expiring in the fall of 1906.

The agreement in one clause says that the purchaser "shall immediately after execution of the agreement have the right to possession of the premises." There is, however, another clause which says that he shall have posses-

sion to fall plough as soon as the crop of 1906 is off. This latter clause would be absolutely meaningless if the former is to be given effect to. Whichever clause is to govern, it is clear, I think, that the purchaser was to get possession for the purpose of ploughing at least as soon as the crop of 1906 was off, which was not later than 1st October. The purchaser applied to the tenant several times for possession of the buildings as well as the land, but no offer was made to give him possession of the land alone, and, when he first applied at least, the tenant's objection would go to the land as well as the buildings, as he had not, at that time, received notice from the vendor terminating the lease. If such notice were not given, he intended to remain on the farm. Had notice been given to the tenant when the agreement of sale was made, the earliest period at which the tenant's right of possession could have been ended would have been in January, 1907.

It is not apparent, therefore, how the vendor expected to give possession even for the purpose of ploughing when the crop of 1906 was removed. But it is argued that by the terms of the agreement the purchaser was to get possession. The agreement says the purchaser is to get possession at the vendor's expense, and it is suggested that a surrender of the lease was to have been secured by the purchaser buying a surrender at the vendor's expense. That is, that the plaintiff and the tenant would agree upon an amount that the vendor would have to pay to induce the tenant to yield up possession to the purchaser as soon as the crop of 1906 was off.

It was not stated what would happen in the event of the tenant stipulating for a price which the vendor could not afford to pay, or refusing to agree upon any price. I do not think anything of the kind was within the contemplation of the parties.

I think what was meant by the purchaser getting possession at the vendor's expense was that he should take the necessary proceedings to oust any occupant who had not a right to retain possession—that the tenant's lease having expired at the time represented he would take steps to turn him out in the event of his holding over. To my mind the plain conclusion is that the vendor entered into an agreement which he did not perform, and which he was powerless to perform. The vendor took no steps whatever to give the plaintiff possession, and, although he was probably not

bound to actually give possession, he was clearly bound to extinguish the right of his tenant to hold adversely to the purchaser, and so make it possible for the plaintiff to get possession. As it was not possible for the purchaser to get possession for the purpose of ploughing the land until too late to do any ploughing that season, I think the purchaser was justified in rescinding the agreement and demanding his money back.

The plaintiff bought a number of horses for the purpose of working the farm, which he subsequently had to sell at a loss. He also bought a quantity of implements, which, however, he had not sold. The plaintiff claims damages in respect of this loss. It does not, however, appear that the vendor knew that these preparations were being made, or that it was necessary for the purchaser to make them, or that the purchase of this stock and machinery was contemplated by the parties at the time the contract was made. I do not think, therefore, that the purchaser can recover under this head. Godwin v. Francis, L. R. 5 C. P. 295, supports this view.

There will be judgment declaring the agreement cancelled, and for the payment by the defendant to the plaintiff of $1,600 and interest thereon at 5 per cent. per annum from date of payment, and costs of suit.

The defendant's counterclaim will be dismissed with costs.

MANITOBA.

MATHERS, J. JULY 12TH, 1907.

CHAMBERS.

FOLEY v. HALLETT.

Costs—Summary Disposition by Consent—Costs of Motion to Set aside Default Judgment—Costs of Action.

Motion by plaintiffs, brought on by consent, for an order disposing of the costs of the action. Judgment was obtained by default against the defendant Elizabeth Hallett, which judgment was set aside by RICHARDS, J., and she allowed in to defend. The costs of the motion were reserved for the trial Judge.

A. E. Hoskin, for plaintiffs.

A. Monkman, for defendant.

MATHERS, J.:—I have spoken to Mr. Justice Richards, and he informs me that he found, as a fact, that the statement of claim had been served upon defendant Elizabeth Hallett, but that, owing in some measure to her then physical condition, she did not understand it, and so let judgment go by default. On that finding, I think the plaintiffs entitled to the costs of setting the judgment aside. The plaintiffs had done all they were required to do, and it was not their fault that the defendant let judgment go by default.

I do not think, however, that the plaintiffs could get any relief in the action as it is framed. Before the certificate of judgment was registered, the land had been sold. There was, therefore, nothing upon which the judgment could operate. As the plaintiffs base their claim to relief upon a charge created by the registration of the certificate of judgment, it seems to me they could not have succeeded in the action. Bank of Montreal v. Condon, 11 Man. L. R. 336, is a clear authority against the plaintiffs.

I think the plaintiffs are entitled to the costs of the motion to set the judgment aside and of the costs rendered useless by the judgment being set aside. The costs should, however, be taxed on the basis of the plaintiffs appearing on but not opposing the motion.

The defendant Elizabeth Hallett is entitled to her general costs of defence, including the costs of this motion.

NORTH-WEST PROVINCES.

(CALGARY.)

STUART, J. APRIL 6TH, 1907.

CHAMBERS.

RE BABBITT AND BOILEAU.

Vendor and Purchaser—Contract for Sale of Land—Proof of —Memorandum in Writing—Statute of Frauds—Fraud and Misrepresentation—Declaration that no Agreement Entered into—Land Titles Act—Application to Discharge Caveat—Summary Trial of Issue.

Application under sec. 91 of the Land Titles Act, 1906, by one Adolphe Boileau, the registered owner of the north-

west quarter of section 2 in township 25 in range 2 west of the 5th, for an order that a caveat registered against the land by one Lauriston A. Babbitt, wherein Babbitt claimed to be entitled to a transfer of the land from Boileau under an agreement of sale, should be discharged. The summons was issued upon an affidavit of Boileau wherein he stated that he had never agreed to sell the land, and that the document which Babbitt had obtained, and upon which the caveat had been registered, had been obtained by fraud and misrepresentation.

Stanley L. Jones, for Boileau.

W. P. Taylor, for Babbitt.

STUART, J.:—Upon the return of the summons, I had expected that probably an affidavit would be filed on behalf of Babbitt, and that there would then be some discussion as to the proper procedure to be taken under the new Act, and that a direction would be asked from me in regard to it. Instead of this, however, the advocates of the parties came into Chambers, bringing with them every possible witness that knew anything about the case. The advocate for the applicant Boileau asked that the merits of the whole matter be disposed of in a summary way. The advocate for Babbitt did not exactly consent to this, but it appeared that he had a few days previously examined Boileau for discovery, as it was said, by consent. At any rate, the examination was not upon the affidavit, and the document filed with the clerk is called an examination for discovery. In view of these circumstances, I decided to hear the oral evidence in a summary way in Chambers, and to give a decision on the merits of the dispute, instead of merely upon the point whether the caveat had been properly filed or not. In Hogg on the Australian Torrens System, p. 1042, I find it stated as follows: "On hearing of the motion or summons, the Courts have frequently decided the merits of the question at issue between the parties at once, where this could be done conveniently, or they may order the caveat to remain till further order, or may order the caveat to be removed if proceedings are not taken by a specified time to establish the claim of the caveator. It has, however, been held that the Court can only either remove the caveat or order it to remain, and cannot adjudicate finally on the rights of the

parties." It is apparent from this that the practice varies in the different States of Australia, where practically the same statutory provisions exist as those of sec. 91 of our Act. It appears to me that it is the intention of the new Act to provide a means of reaching a speedy decision upon the merits of a dispute as to the sale of real property, where a caveat has been filed which ties the property up. In this particular case, moreover, all the witnesses were present, all the documents had been produced, and Babbitt had had the advantage of examining Boileau for discovery. There was, therefore, no reason that I could see why the dispute should be longer drawn out, and the delay incurred which is incident to a formal action.

It appeared in evidence that Boileau had authorized one Girvin, a milkman, to secure a purchaser for his property at the price of $4,500, promising him 5 per cent. commission. Girvin's son, who is a real estate agent in the city of Calgary, was present at this conversation, although it did not appear that any authority had been given to him either by Boileau or Girvin senior. Girvin junior then went to Babbitt, who is also a real estate agent in the city of Calgary, and is carrying on business with one Morris, and told him what he had heard. Babbitt thereupon, without seeing or speaking to Boileau, advertised the land in question for sale in the list of properties published by him in his usual advertisement in the newspapers, and stated the price to be $5,000. In response to this advertisement, one Levi Houghton came to Babbitt's office and entered into negotiations in regard to the purchase of the property. On 8th February, Girvin junior, Morris, and Houghton started to drive out from Calgary to Boileau's place. They had not proceeded far when they met Boileau on the road driving a load of hay. Houghton jumped out of the rig in which he was riding and went and had some conversation with Boileau, which was not admitted in evidence. Boileau then came on into Calgary, and the other three drove out to the place and inspected it. That evening they returned to the city, and Girvin and Babbitt met Boileau in the Queen's Hotel. They went from there to Babbitt's office, where a discussion took place between Boileau, Girvin junior, Morris, and Babbitt in regard to the place. Girvin told Boileau that Houghton was well satisfied with the place, and Boileau states, "I was told that my place was sold to Levi Houghton." This was in Babbitt's presence. An appointment was then made for

half-past 10 the next morning at Babbitt's office. The next morning a meeting took place at his office as arranged. Babbitt says that Houghton came first, then Girvin and Morris, and afterwards Boileau. Babbitt, it appears, had succeeded in inducing Houghton to buy the place for $4,950, and he got a cheque from Houghton in his own favour for $200 as a deposit. After he got this cheque, he (Babbitt) states that he interviewed Boileau apart in an inner office and asked him, "What is your net price to me for your place?" to which Boileau replied "$4,256." After getting this information, Babbitt wrote out a receipt and gave it to Houghton in the following terms:—

"Calgary, Alberta, Feb. 9th, 1907.

"Received from Mr. Levi Houghton $200 (two hundred dollars) deposit on the north-west quarter of section 2, township 27, range 2, west of the fourth, with all improvements and stock, implements and furniture, excepting clothing, bedding, sewing machine, and clock, purchase price to be $4,950 (four thousand nine hundred and fifty dollars): $500 to be paid February 12th, 1907; $3,150 (three thousand one hundred and fifty dollars); to be paid March 9th, 1907, or sooner if possible; balance of $1,100 mortgage.

"L. A. Babbitt."

Having given this receipt to Houghton, Babbitt took the cheque for $200 and indorsed it and handed it to Boileau, and received from him the following receipt:—

"Calgary, Alberta, Feb. 9th, 1907.

"Received from L. A. Babbitt $200 deposit on the north-west quarter of section 2, township 27, range 2, west of the 5th, with all improvements and stock, implements and furniture, excepting clothing, bedding, sewing machine, and clock, purchase price $4,256 (four thousand two hundred and fifty-six dollars): $500 (five hundred) to be paid February 12th, 1907; $2,456 (two thousand four hundred and fifty-six dollars), to be paid March 9th, 1907, or sooner if possible; balance $1,100 mortgage.

"A. Boileau.

"Witness: William John Morris."

Babbitt says that he does not think that Boileau knew what he, Babbitt, had signed and given to Houghton, and Houghton did not know what he had taken from Boileau. He says, "It was my business to keep them apart probably,

because if Houghton knew what I was getting it from Boileau for, he would want another reduction in the price." Boileau in his evidence states: "Babbitt mentioned the commission the first night. He mentioned $250. I said I did not think it would be that much. He took his pencil and started to write in figures, and I said I thought it would be $244. He said, 'Oh, yes; that is right.'" The next that occurred was when Boileau went to Babbitt's office for the $500 on 12th February. He swears that they told him to wait, as they were going over to get a cheque from Houghton. Babbitt says that he did go to Houghton for the cheque. He says further, "I gave him to understand that if he did not pay it, and if he did not pay it that night, I was going to pay it in the morning, and he would lose his deposit of $200, and there was no chance of him having the place after 12 o'clock that night." Houghton gave Babbitt a cheque for $500, and Babbitt returned to his office, and, after indorsing it, handed it to Boileau. Some question had arisen as to a set of harness which Boileau claimed was not going with the place, but which Houghton wanted, and it was worth $44. Boileau wanted to be allowed this $44, and Babbitt states that at the interview, when the $500 cheque was handed over to Boileau, the latter said, "You can well afford to make $44 for me, as you are making $5,000," and I said 'No, I am getting $4,950." After receiving the cheque for $500, Boileau signed another receipt in practically the same terms as the receipt above quoted of 9th February.

Babbitt contends that the result of what occurred is that Boileau agreed to sell the place to him. He asserts that he was not acting in any way as an agent, but that he was simply buying from Boileau and re-selling to Houghton at a profit, which, he said, he had a perfect right to do. Boileau asserts that he thought all the time he was selling to Houghton, that he never intended or agreed to sell to Babbitt, that, although the receipt of 9th February was read over to him before he signed it, it did not indicate to him in any way that he was making the sale to Babbitt, but only that he had received the money from Babbitt, which was the fact.

There is no question under the authorities that, if Boileau did, in fact, agree to sell to Babbitt, the receipt of 9th February is a sufficient memorandum of the agreement to satisfy the Statute of Frauds. The real question to be decided is: Did Boileau, in fact, agree to sell the land to Bab-

bitt? Before dealing with this question, there is one matter to which I desire to refer. It may be said that it cannot make any difference to Boileau whether he was selling to Babbitt or to Houghton, inasmuch as he was in any way getting his price. I may say at once that I do not see how this could have anything to do with the question, even if the sale were for cash. There is a simple question of fact to decide, upon the evidence, and the circumstance that it could make no difference to Boileau from whom he got his price cannot surely be allowed to have any weight in coming to a conclusion upon that question of fact. He either agreed to sell to Babbitt or he did not; and if the Court is of opinion from the evidence that he did not in fact so agree, it certainly would not be proper for the Court to say, "It is true you did not agree to sell to Babbitt; but it does not make any difference to you whether you did or not if he pays you the price, and therefore we will make you agree." This would be making an agreement for the parties, which the Court cannot do. Moreover, in this case there was credit given, and the personality of the buyer might in that case be of considerable importance to the seller.

In Leake on Contracts, p. 8, it is said: "An agreement may be defined as consisting of two persons being of the same intention concerning the matter agreed upon. The intention of a person can be ascertained by another only by means of outward expressions, as words and acts, and for the purpose of agreement there must be a communication of intention between them by means of such expressions." In this case we are, therefore, to inquire what outward expressions there are, either by words or acts, which indicate the intention on the part of Boileau to sell this property to Babbitt. In my opinion, there is not a single expression or act on the part of Babbitt proven in the evidence which is not just as consistent with an intention to sell to Houghton as with an intention to sell to Babbitt. Take first the verbal conversation which Babbitt swears to. He states that he asked Boileau, "What is your net price to me for your place?" And in another part, instead of saying "to me," he uses the words "from me." To this question Boileau replied, "$4,256." Now, it will be remembered that Boileau was asking $4,500, and expected to pay a commission. Girvin junior knew this, and I am convinced that Babbitt knew it as well. Boileau, instead of saying to Babbitt, "I will sell

you my place for $4,256," merely answers the question asked him. I cannot see how this can be construed into anything more than this: "I want $4,500 for my place, but there is commission to be paid, and if you (Babbitt) will hand me over $4,256, I will sell the place." There had been a conversation the night before about the commission between Boileau and Babbitt, and in this respect I accept Boileau's statement of that conversation as true. I cannot understand how it can be said that Boileau would, in speaking directly to his purchaser, mention any less sum than $4,500. The very fact that he deducted the commission before stating the price, which I hold he did, shews, to my mind, conclusively that he did not understand that he was speaking to his purchaser, but thought that he was speaking to an agent, who intended to deduct the commission. As I say, I think Babbitt must have known that Boileau thought he was speaking to an agent when he made this deduction. It is absurd, I think, for Babbitt to attempt to make out an agreement of sale to him, simply because he himself used the two little words "to me" or "from me," in his question, perhaps without the emphasis which he gave them when quoting them in Court. The words might very well have passed unnoticed entirely by Boileau. The words which he would really notice would be the words "net price," which themselves suggest the idea of a commission. In any case, it is familiar law that the mere asking for a price and getting an answer does not constitute an agreement for a sale. See Harvey v. Facey, [1893] A. C. 552.

It may be said that Boileau signed the memorandum. That is true. But there is not a word in it which necessarily means that Boileau agrees to sell to Babbitt, either personally or in any capacity. In all of the cases where such a memorandum has been held sufficient to satisfy the statute, the agreement itself and the parties to it have been proven by extrinsic evidence; but it is quite another thing, in a case where there has been a failure to make out an agreement of sale to a particular person by extrinsic evidence, to attempt to make the memorandum itself the agreement. Of course, the memorandum might have been drawn in such a way as to constitute the agreement in itself, but the trouble in this case is that the receipt of 9th February does not say that Boileau agrees to sell to Babbitt. It merely says that Boileau has received certain money from Babbitt as a

deposit on certain land, which was the fact. In the circumstances, the wording of the receipt is entirely equivocal, as far as the point in dispute is concerned. It is just as consistent with Boileau's account of the transaction as with Babbitt's; besides, we must remember that Babbitt drew it himself, and that he was clearly attempting to occupy the position of a purchaser from Boileau and a vendor to Houghton without coming out into the open and letting either of them know very clearly what he was about. It seems to me the most natural thing in the world that Boileau should think throughout the whole transaction that he was selling direct to Houghton. Babbitt's partner, Morris, and young Girvin drove Houghton out to the place, and Boileau met them on the road. That same night he was told in Babbitt's office that Houghton was pleased with the place and that he had agreed to buy. When he went to Babbitt's office next day, he found Houghton there. They were both in the real estate office together. It was Houghton's cheque that was given him as a deposit, although it passed through Babbitt's hands. Boileau swears that he always thought he was selling to Houghton. In view of all these circumstances, I believe he did so think. Even Babbitt himself, when he was asked if he thought Boileau understood that he was selling to himself, would not swear that he did think so. He simply told the Court what he would have understood if he had been in Boileau's place, which is a different matter. Moreover, Babbitt admits that Houghton might have thought he was acting as an agent, and his statement that when he went to get the $500 he told Houghton that if he (Houghton) would not pay it, he (Babbitt) would pay it himself, constitutes, to my mind, a clear admission that it was well understood between Babbitt and Houghton at any rate that Babbitt was an agent. If Babbitt was a purchaser, then he would have to pay the $500, whether Houghton paid it or not. I do not see how Babbitt can be heard to say that he was acting in his relations with Houghton as an agent, and that he occupied a different position in his relations with Boileau.

For a time, however, I did not see how Boileau could substantiate his allegation of fraud against Babbitt. It appeared to me Babbitt was indeed trying to do a very clever thing, but that there was nothing wrong either in attempting to do it or in doing it. A man has a perfect right, no

doubt, to buy property at one price and sell it at a higher price. He has even a perfect right to sell it at a higher price before he buys it at a lower, if he wants to take the risk; but there is more than that in this case. I repeat again that I am convinced that Babbitt knew that Boileau, in stating his price, was allowing for a commission; and yet, according to his own story, he acted solely as a purchaser, and accepted the price named as the purchase price. If there had been any suggestion that Boileau was authorizing him to pay the difference between the price named and the $4,500 as a commission to Girvin, this might have constituted a reasonable explanation; but there is nothing of the kind. Babbitt, in fact, quietly takes the advantage of a commission to himself, and yet attempts to maintain the position of a purchaser. If this does not amount to fraud, it comes very near to it. It may be said that Boileau was not injured; but if he was not selling through an agent, he ought to get his full price and not be shorn of the commission. It is remarkable how careful Babbitt and Morris and Girvin junior all were to avoid any suggestion that they were claiming a commission. It would have been dangerous for Girvin to claim it, owing to his connection with the other two. If Boileau could sell his place without anybody being entitled to a commission, then he ought to have got his $4,500, and it is in this respect that he is injured. It was urged that, because Houghton and Boileau subsequently entered into an agreement between themselves for the purchase and sale of the property for $4,500, the whole thing was a scheme to save $450 for Houghton and $244 for Boileau. No doubt this will be the result if the application is granted; but I do not see how this can affect my finding upon the facts of the case. It might affect the credibility of their evidence; but there is practically no dispute between Babbitt and Boileau as to outward, tangible acts and statements, although there is a dispute as to secret intentions. The one exception may be Boileau's account of the conversation in regard to a commission on the night of 8th February; but, even if that account had not been given to Boileau, I would still have been convinced that Babbitt knew that Boileau was deducting a commission and stating his price, and that he knew that Boileau thought he was dealing with an agent.

It was also urged because Boileau said what he did on 12th February about Babbitt making $5,000 out of the place,

that this is evidence that he knew Babbitt was a purchaser from the beginning. Here again I think this remark by Boileau is entirely equivocal. It might just as well be interpreted to mean, " You are taking $5,000 from the purchaser, and only giving $4,256 to me," as anything else.

I therefore find that Boileau never agreed to sell the land to Babbitt, and the order will, therefore, direct the removal of the caveat and contain a declaration that no such agreement as is alleged was ever entered into. The order, however, will not issue until the expiration of 30 days from this date, and then only upon satisfactory evidence that no appeal has been taken from the judgment now given. Babbitt will pay Boileau's costs of this application.

NORTH-WEST PROVINCES.

(REGINA.)

APRIL 30TH, 1907.

FULL COURT.

McLORG v. COOK.

Mortgage — Consideration — Burden of Proof — Fraud — Corroboration—Action by Administrator of Estate of Deceased Mortgagee — New Trial — Discovery of Fresh Evidence — Admissions of Widow of Mortgagee — Corroborative Evidence.

Appeal by defendant from the judgment of the trial Judge in favour of the plaintiff, administrator of the estate of Philip Lee Cook, deceased, in an action upon two mortgages.

J. T. Brown, Moosomin, for defendant.

E. A. C. McLorg, Moosomin, plaintiff in person.

The judgment of the Court (SIFTON, C.J., WETMORE, SCOTT, NEWLANDS, HARVEY, and STUART, JJ.), was delivered by

SCOTT, J.:—The plaintiff's claim in this action is upon two mortgages made by the defendant to the deceased, one being a mortgage of real estate to secure $1,000 and interest, and the other a chattel mortgage to secure $2,000 and interest. Plaintiff claims under the covenants contained in these mortgages a personal judgment against the defendant for the full amount of the principal and interest thereby secured, and also claims that in default of payment of the first mentioned mortgage the lands therein comprised should be sold and the proceeds applied in payment of the mortgage money, or, in default, foreclosure.

The execution of the mortgages having been admitted at the trial, the only defence relied upon by the defendant was that there was no consideration therefor.

The only evidence at the trial was that of the defendant, who stated that he never received one cent of the consideration mentioned in the mortgages, and that he gave them to make himself secure against the J. I. Case Co., having asked deceased to take them for that purpose. There is absolutely no evidence to corroborate these statements.

The trial Judge directed judgment to be entered for the plaintiff for the full amount of the mortgage moneys and interest, and also directed the reference usually directed in mortgage actions. From this judgmnt the defendant now appeals, the grounds of appeal being that the judgment is against law and evidence and the weight of evidence, such evidence shewing absence of any consideration.

He also applied for a new trial on the ground of discovery of fresh evidence.

At the end of the chattel mortgage in question there appears the usual affidavit of bona fides by the deceased, viz., that the defendant was then indebted to him in the sum of $2,000; that the mortgage was executed in good faith and for the express purpose of securing the payment thereof, and not for the purpose of protecting the goods and chattels comprised in the mortgage against the creditors of the defendant, or of preventing such creditors from obtaining payment of any claim against him. There is also indorsed upon the mortgage an affidavit of the defendant, in which, after making certain statements as to the ownership of the goods and chattels comprised in the mortgage, the absence of incumbrances or liens thereon, and other matters, he alleged that those statements

were made with the intent and for the express purpose of raising a loan upon the security of the mortgage.

Apart from any question as to whether the uncorroborated testimony of the defendant should be accepted as against the personal representative of a deceased person, I think the trial Judge was justified in holding that the defendant had failed to establish the absence of consideration. In fact, I do not see how he could have arrived at any conclusion other than that no reliance should be placed upon the defendant's testimony at the trial. What weight could be attached to the statement of a witness who admits that for the purpose of perpetrating a fraud, he not only committed wilful perjury himself, but also induced another to do so?

It was contended on the part of the defendant that where there is a denial of consideration the onus is upon the plaintiff to shew such consideration.

The authorities cited in support of this contention do not bear it out. At the most they shew that in mortgage actions where the action is undefended, or in taking accounts in the Master's office, the mortgagee is, by the practice of the Court, required to shew by affidavit that the mortgage moneys were actually advanced, but this falls far short of supporting that contention.

In the case cited by counsel for the defendant, Re Garnett, Gandy v. Macaulay, 31 Ch. D. 1, Brett, M.R., says at p. 8: "It was said that the release to the aunt had no value in itself; that the person to whom it was given, or those representing her, were bound to shew — inasmuch as she had been a trustee—that everything in regard to that deed had been fully explained in the first instance. I cannot agree to this proposition, which is in effect that if a deed is produced in a court of equity, although in a court of common law it would not need any consideration to be proved, the person in whose favour a deed is executed is thereupon to have the burthen of proof thrown upon him of shewing that the deed was given for a good consideration.

The fresh evidence discovered by the defendant since the trial which is relied upon as a ground for obtaining a new trial, is disclosed in the affidavit of one Montgomery, who states that in a conversation with the wife of deceased after his death she stated that a mortgage had been found among his papers executed by the defendant; that she knew that it was given to protect the defendant against a threshing ma-

chine company; that she was satisfied that no money had passed from her deceased husband to the defendant under the mortgage; that defendant had acted unfairly towards her husband in the matter of a pre-emption; and that consequently her son John J. Cook intended if possible to make the defendant pay up the amount of the mortgage.

It is, to my mind, open to serious doubt whether, if a new trial was granted, this evidence would be admissible. It is true that the plaintiff is a trustee of the estate, but it is not shewn that the wife of the deceased has any interest therein; although the estate is shewn to be of considerable value, it is not shewn that it is sufficient to pay the debts of the deceased. Even if it were shewn that the wife possessed any such interest, it is at least doubtful whether any admissions made by her would bind either the other persons interested or the plaintiff.

Apart from this question, however, the discovery of new evidence which is merely in corroboration of that adduced at the trial does not appear to be a sufficient ground for directing a new trial: see Trimble v. Horton, 22 A. R. at pp. 52, 56, and Howarth v. McKeggan, 23 C. R. at p. 401.

For the reasons I have stated, I am of opinion that the appeal should be dismissed with costs and a new trial refused.

NORTH-WEST PROVINCES.

(EASTERN ASSINIBOIA.)

WETMORE, J. MAY 11TH, 1907.

CHAMBERS.

JOHN ABELL ENGINE AND MACHINE WORKS CO. v. SCOTT.

Execution — Sale of Land under — Homestead Exemption —Exemptions Ordinances—Dominion Lands Act—Land Taken up by Execution Debtor and Rented to Stranger— Advertisement of Sale — Publication — Sufficiency — Rule 364 — Compliance with—Application to Confirm Sale — Intituling of Proceedings — Land Titles Act — Transfer — Affidavit of Subscribing Witness Taken by Unauthorized Person—Permission to Reswear.

Application by Henry Abell to confirm a sale to him by the sheriff of the judicial district of Eastern Assiniboia of a

lot of land seized and sold by the sheriff under an execution issued at the suit of the plaintiffs against the lands of the defendant Scott.

E. A. C. McLorg, Moosomin, for the applicant.

E. L. Elwood, Moosomin, for defendant Scott, opposed the confirmation.

WETMORE, J.:—A number of objections are taken, some of them of a somewhat technical character. Two very substantial objections are raised, however, and I will deal with them first. The land in question, consisting of a quarter section of 160 acres, was, according to Scott's affidavit, patented to him as a homestead on 13th August, 1892, he having taken up the same as a homestead under the provisions of the Dominion Lands Act. He lived on the land until the month of November, 1898, when he moved therefrom, and since such removal he has continuously rented it down to the present time. He has not taken up any other land in this province or in the province of Alberta or elsewhere as a homestead, and he states in his affidavit that this quarter section is the only land which he ever owned or now owns as a homestead. It is contended that this land is exempt from seizure under the Exemptions Ordinance, Con. Ord. ch. 27, sec. 22 of which provides as follows: "The following real and personal property of an execution debtor and his family is hereby declared free from seizure by virtue of all writs of execution, namely;

. . . .

"9. The homestead, provided the same be not more than 160 acres; in case it be more, the surplus may be sold subject to any lien or incumbrance thereon.

"10. The house and building occupied by the execution debtor, and also the lot or lots on which the same are situate according to the registered plan of the same, to the extent of $1,500.

It is urged that the expression "homestead" used in par. 9 of this section means a homestead within the meaning of the Dominion Lands Act, R. S. C. ch. 54. I am of opinion that this contention is not correct. So far as I am able to discover, the expression in the last mentioned Act relates entirely to the entry for the land. The Act provides that a person who intends to apply for land, which he may secure by performing certain duties of improvements and settling upon the land, and without the payment of money (except a small entry fee), may make what is called a homestead entry. When a

patent is issued in respect to any such land, it is not described as a homestead. Moreover, if I hold the contention urged on behalf of Scott to be correct, the result would be that paragraph 9 of the Ordinance would only apply to land with respect to which the owner had performed homestead duties under the Dominion Lands Act; it would not apply to land which the owner had acquired by purchase, or in any other way. I am satisfied that the legislature never intended that the paragraph should have such a limited operation. The intention of the paragraph was to secure to persons of the farmer class, as against their creditors, a means of livelihood by which they could support themselves and their families. It might be urged that paragraph 10 of the Ordinance would effect that purpose if I gave paragraph 9 the limited operation contended for. But I am of opinion that cases would frequently arise when that paragraph would not carry out the intention of the legislature so far as the farming classes are concerned. I may add that I am inclined to the opinion that paragraph 10, while not limited to such purpose, is intended principally to cover the cases of persons residing in cities, towns, or villages, and having small holdings. Now, the word "homestead" is an English word,, and is found in all the dictionaries. I see no reason why it should not in construing the Ordinance in question be given its plain, ordinary meaning. I find in the Standard Dictionary that it is defined as follows: "The place of a home; the house and adjacent land occupied as a home." The land in question cannot under such a definition be held to be the homestead of Scott. Neither he nor his family have lived there for nearly 9 years. It has not during all that time been occupied by him or them as a home. He has rented it to other persons, He does not state, nor can I infer, that he left the property animo revertendi. In fact, under the circumstances, I must infer that he has no present intention of returning to it. I therefore hold that the land is not exempted from seizure under execution.

It is contended in the next place that the sale was not sufficiently advertised. Rule 364 of the Judicature Ordinance provides that the "officer shall not sell the land . . . until three months' notice of such sale has been posted in a conspicuous place in the sheriff's and clerk's offices respectively, and published two months in the newspaper nearest the land to be sold." The sale took place on 9th

February, 1907. The notice of sale was published in the "Elkhorn Advocate" (the newspaper nearest the land) in the issues of the 6th, 15th, 22nd, and 29th November, and of the 6th, 13th, and 20th of December, and of the 24th and 31st January. This paper was published weekly; that is, that was the usual course. It will be observed that the notice was not published on the 27th December or the 3rd, 10th, or 17th January. In order to make two months' publication in successive weekly issues of the paper, it ought to have been published on the 27th December and 3rd January. The reason why it was not published is that there was no issue of the paper between the 20th December and the 24th January. The proprietor after the 20th December proceeded to install a new press and engine; he shipped his old press away, and, owing to delays in the receipt of parts of his engine, he was not able to resume publication of the newspaper until the 24th January. It has been urged that the provisions in the Ordinance respecting publication of notice are merely directory, that the omission to comply therewith at the most is only an irregularity, and will not avoid the sale, and I have been referred to Jarvis v. Brooke, 11 U. C. R. 299, and Connor v. Douglas, 15 Gr. 456. I may say, with great diffidence, that I would hesitate before I adopted the conclusions reached by the Courts in these cases, in so far as the effect of an omission to publish the notice of sale for the term prescribed by the legislature is concerned. I am inclined to the opinion that the law was more correctly laid down by Draper, C.J., and Mowat, V.-C. Moreover, the section of the Ordinance is not merely imperative; it does not say that the officer shall publish the notice; it says that he "shall not sell" the lands until the prescribed publication is made; it is prohibitive. It is not necessary, however, for me to express a decided opinion upon the question, because I am of opinion that the requirements of the Ordinance have been complied with. That is, starting from the 8th November, when the first publication of the notice appeared, it was published in each and every issue of the paper for two months. That is, the notice appeared in every issue of the paper that was issued during these two months. In Connor v. Douglas, 15 Gr. at p. 466, Draper, C.J., is reported as follows: "When it was enacted that the list should be published for three calendar months, the meaning was that in every Gazette published in the three months next after the first publication of

such advertisement the publication should be repeated . . . . I conclude therefore that under the Act . . . . the sheriff's duty was to publish the list of lands to be sold for taxes together with . . . notification of the day of sale in each weekly number of the Royal Gazette which should be issued within 3 months from the first publication." I think that this is very fairly put, and I agree with it. The principle of it is applicable to this case. It was urged that to give effect to that would involve this proposition, namely, if a notice appeared in one or two issues of a paper, and the subsequent issues were for some reason stopped, it would be a compliance with the requirements of the Rule. I do not see that that necessarily follows, because the Court must be careful to see that there is a substantial compliance with the Rule. In this case only two issues of the paper were not made during the two months, no person has been misled, and the sale of the property has not been affected in any way—at least, there was no claim that it had been. I therefore hold that in this matter there has been a substantial compliance with the Rule.

It was further urged that the proceedings on the application should be intituled "In the matter of the Land Titles Act.," &c., instead of being intituled, as they were, in the Court and cause in which the execution issued. I am of opinion that the proceeding to confirm a sale under execution is a proceeding under the Act, and not a proceeding in the Court. But I do not see that the intituling them in the Court and cause invalidates them, nor do I see that the omission to intitule them "In the matter of the Land Titles Act," &c., invalidates them either. In fact I do not see why they need be intituled at all. To intitule them in the Court and cause may afford a convenient method of setting forth some of the facts without prolixity.

The affidavit of the subscribing witness to the execution of the transfer was sworn before the clerk of the Court. This is clearly bad. Section 145 of the Land Titles Act prescribes the officers before whom affidavits of this character shall be sworn, and the clerk is not one of them. It was urged that it was not necessary to bring the transfer before the Judge on an application to confirm a sale; that the application is to confirm the sale, not the transfer. That is so, but the transfer is part and parcel of the sale. It is the instrument by which effect is given to it, and sec. 132 of the Act pro-

vides that the order of confirmation is to be indorsed on or attached to the transfer. This clearly contemplates that it shall be brought before the Judge, and if brought before him he must pass upon it. I was asked to allow the attesting witness to swear to the affidavit before a proper officer. This was objected to, on the ground that the application must stand or fall on the material produced when the appointment was taken out, and I was referred to Kerr Co. v. Suter, 5 W. L. R. 256, decided by me. That was an application for security for costs, and the affidavit in question, which was the only one on which the application was based, was bad in substance. I ought not to have issued a summons upon it at all. In this case the material on which the appointment was made was substantially correct; only the attesting witness, through what I conceive to be a very natural mistake, swore to his affidavit before the wrong officer. It is quite usual to allow mistakes of that character to be corrected. Moreover, sitting as I am in this matter as persona designata, I am not as strictly bound by technical rules, as I would be if I was dealing with a matter in the Court. I will allow the affidavit to be resworn. There are, however, one or two particulars which require to be explained or corrected so as to enable me to make an order confirming the sale. I will state these to the advocate for the applicant. Upon these explanations or corrections being made and the affidavit of the attesting witness properly sworn, I will confirm the sale.

NORTH-WEST PROVINCES.

(WESTERN ASSINIBOIA.)

JOHNSTONE, J. MAY 14TH, 1907.

TRIAL.

LOCKWOOD v. McPHERSON.

Mortgage — Action on—Proof of Execution — Default in Payment — Defence—Mortgage Given for Price of Horses —Breach of Warranty as to Age—Reference—Damages —Deduction from Amount of Mortgage—Costs.

An action upon a mortgage.

H. D. Pickett, Moose Jaw, for plaintiff.

C. E. Armstrong, Moose Jaw, for defendants.

JOHNSTONE, J.:—On 14th December, 1906, the plaintiff brought this action for the recovery of the sum of $462 and interest, the full amount secured by a mortgage made by defendants to plaintiff dated 2nd February, 1906, covering lot 16 in block 127 in the city of Moose Jaw.

The first payment of principal and interest fell due on 1st November, 1906, and by reason of default in the payment of this instalment on the due date the plaintiff claimed payment of the whole amount of the mortgage moneys and interest, and in default foreclosure of the interest of the defendants in the lot referred to.

The defence to the action denied the execution of the mortgage, and, in the alternative, alleged that, if the mortgage was executed by them, the same was given for collateral security for the payment of the sum of $450, the purchase price of a team of horses bought by the defendant John McPherson from the plaintiff, and that on the sale of the horses to the said defendant he, the plaintiff, warranted such horses to be sound and to be fit for farm work and to be rising 7 and 8 years of age respectively; that the said horses were not then sound and were not fit for farm work, and were at least 12 years old, and that the horses had been returned by the defendant McPherson to the plaintiff.

The defendant John McPherson claimed $200 damages.

Plaintiff in his reply admitted that the mortgage was given to secure payment for the horses, but as to the other defences joined issue.

The trial took place before me on 14th April last at Moose Jaw.

The subscribing witness as to execution was called, and the due execution of the mortgage in question by the defendants was proved.

Default took place in the payment of principal and interest which fell due on 1st November, 1906, and by reason of this default the whole amount secured by the mortgage at once became due and payable.

Both defendants swore positively as to the warranty of the plaintiff as to age, soundness, and fitness of the horses, and, although the plaintiff denied any such warranty, in his examination he admitted that "he might have said on the sale the horses were 8 years old."

Expert evidence was given to satisfy me that the horses were over 12 years old on 8th November, 1906, the date of the

examination by the veterinary. There was no evidence adduced as to unsoundness, nor was there any evidence that the defendant John McPherson had ever attempted to repudiate the contract or that he had made any claim for breach of warranty until one week at least after the first payment of mortgage moneys fell due—when he returned the horses to the stable yard of the plaintiff.

There was no arrangement giving the defendants the right to return the horses on breach of warranty, and plaintiff rightly refused to accept return.

I find as a fact that there was a warranty as alleged in the defence, and that there was a breach of such warranty as regards the age of the animals, and that the defendant John McPherson has suffered damages by reason thereof, but I am unable on the evidence to ascertain and fix the amount to which the said defendant should be entitled, and the plaintiff's claim reduced accordingly, to do complete justice between the parties in this action.

There will be the usual direction for a reference to the deputy clerk at Moose Jaw to ascertain the amount of the said damages; the plaintiff to have judgment for the amount due under his said mortgage for principal, interest, and costs, less the said damage so to be ascertained, and the costs of the issues in the defendants' favour and of the said reference.

NORTH-WEST PROVINCES.

(WESTERN ASSINIBOIA.)

JOHNSTONE, J. MAY 15TH, 1907.

TRIAL.

READING v. COE.

Estoppel—Work and Labour—Claim for Price of—Application on Purchase Money of Land—Mortgage for Purchase Money.

Action to recover a balance of $692.30 upon an account for threshing done by plaintiff for defendant.

G. E. Taylor, Moose Jaw, for plaintiff.

C. E. Armstrong, Moose Jaw, for defendant.

JOHNSTONE, J.:—The evidence adduced was of the most conflicting character.

Plaintiff on or about 1st September, 1905, entered into an agreement in writing with the defendant and his brother, J. C. Coe, for the purchase from them of certain lands at the price of $3,320, together with interest, to be secured by a mortgage on the lands purchased covering a period of years. Subsequently in the year 1906 a verbal agreement was entered into between the plaintiff and the defendant that the former should do the threshing of the latter of the year 1906, the defendant contending that it was agreed that the amount to which the plaintiff would be found entitled would be credited on the purchase money and interest. This the plaintiff denied, and several witnesses were called and gave evidence corroborating the sworn statements of both litigants as to the agreement in this respect.

The threshing was done by plaintiff as agreed, but some time after a mortgage was taken by defendant from plaintiff, on the lands purchased by him, to secure payment of the purchase price, but, save as to some interest, the moneys accrued from the threshing were not taken into account, and the purchase price of the lands reduced by the full amount thereof.

Defendant in January last having refused to pay for the threshing in question, the plaintiff sued, claiming a balance due him of $692.30. In my opinion, the defendant, through the acceptance of the mortgage from the plaintiff for the full amount of the purchase price of the land (less some interest deducted from the threshing account), is now estopped from asserting the defence that it was part of the agreement as to the threshing that the whole amount earned by plaintiff in doing the threshing for the said year for the defendant should be applied in reduction of the purchase price and interest.

There will therefore be judgment for the plaintiff for $692.30.

NORTH-WEST PROVINCES.

(CALGARY.)

STUART, J. MAY 17TH, 1907.

TRIAL.

ROBERTSON v. TOWN OF HIGH RIVER.

Municipal Corporations — North-West Irrigation Act — Construction of Ditch by Land Owner—Filling up by Municipality — Highway — Dedication — Sale of Lots by Plan—Land Titles Act—Certificates of Title—Authority to Construct Ditch—Conditions—Repudiation — Resolution of Council—Right of Way—Forfeiture—Waiver —Minister of Interior—Territorial Department of Public Works—Orders in Council—Evidence — Presumption — Rebuttal.

An action for damages, and an injunction in respect of the filling up by the defendants of a ditch dug by plaintiff's testator.

James Muir, K.C., and J. E. Varley, for plaintiff.

W. L. Walsh, K.C., and A. Ballachey, for defendants.

STUART, J.:—The plaintiff, who is the executrix under the last will and testament of one Thomas W. Robertson deceased, alleges that the deceased was in his lifetime the owner of an irrigation ditch running in and along certain streets of the present town of High River, which had been constructed under the provisions of the North-West Irrigation Act; that the said deceased was in his lifetime in possession of the right of way of the said ditch, which he had caused to be constructed according to plans and memorials filed in pursuance of the said Act; that the plaintiff, as executrix, has been in peaceable possession and enjoyment of the said ditch and right of way up to the commencement of this action; that on 7th September, 1906, the defendants, by their servants and agents, wrongfully and forcibly proceeded to fill up the ditch at a point on the easterly side of East Railway street in the town of High River, and have

caused serious damage to the ditch. She, therefore, claims damages and an injunction.

The defendants, after denying all the allegations of the plaintiff, plead that the ditch at the spot in question was constructed on a public highway, within the limits of their municipality, without leave from the defendants or from any other person having authority to permit it; that the ditch was in a dangerous condition and impeded travel on the highway; and that the acts complained of were necessarily done to remedy this wrong and to protect the public. They also by counterclaim ask for a declaratory judgment declaring the ditch to have been constructed without lawful authority, directing the plaintiff to fill up the same, or, in the alternative, to comply with certain conditions as to fluming or piping, which they assert were attached to the alleged authority under which the ditch was constructed, and for damages. To this counterclaim the plaintiff pleads that her testator had constructed and was in possession of the ditch prior to the incorporation of the defendants; that no part of the said ditch is on any public highway within the municipality; that, if the defendants ever accepted any land occupied by the ditch as a public highway, this was done subject to the prior rights of the plaintiff; and that the conditions as to fluming referred to by defendants were imposed without authority.

The facts, which it will be convenient to state in chronological order, are as follows. The present town site of the town of High River is situated entirely upon section 6 in township 19 in range 28 west of the 4th meridian. Many years before the town was incorporated, namely, in the year 1893, the owners of various portions of section 6, namely, A. M. Nanton, J. H. Munson, George Lane, W. I. Ikin, Colin G. Ross, and the plaintiff's testator, Thomas W. Robertson, seem to have joined together and procured the survey of a town site adjoining High River, which was then merely a station of the Calgary and Edmonton Railway. The plan of subdivision was duly registered in the land titles office for the South Alberta land registration district on 18th September, 1893, and was signed by all the persons mentioned as owners, in accordance with the provisions of the Land Titles Act. It does not appear what portion of the town site was owned by the testator Robertson. The south half of the section was, however, owned by W. I. Ikin, and the north-

east quarter by George Lane. The railway right of way ran, roughly speaking, through the centre of the town site from north to south, and on either side of the right of way a street was shewn on the plan, the westerly one being called West Railway street, and the easterly one East Railway street. Eastward of East Railway street, and approximately parallel to it, two avenues are shewn on the plan and named respectively First and Second avenues. Approximately at right angles to the line of railway, to East and West Railway streets and exactly at right angles to the avenues, a number of streets are shewn running east and west, which are numbered, reading from north to south, Third, Fourth, Fifth, Sixth, and Seventh streets. These streets on the west meet the Calgary and Macleod trail, which runs in an irregular north and south direction along the western side of the surveyed town site. The exact centre of section 6, i.e., the point where the line dividing the east from the west half intersects the line dividing the north from the south half, is at the very centre of Fourth street, and a very short distance—only a few feet—from the easterly boundary of East Railway street. The spot where the ditch was filled in lies on East Railway street, a little south of Fourth street, and therefore in the extreme north-easterly corner of the south-west quarter of section 6, which quarter, as I have said, was originally owned by W. I. Ikin, one of the persons registering the plan.

A number of lots were sold by the owners according to this plan, although the evidence is rather meagre as to the extent of the sales prior to the year 1897. There is, however, evidence that a number of lots were sold prior to that year. Some time in the year 1897 the testator of the plaintiff made an application to the Department of the Interior, at Ottawa, under the provisions of the North-West Irrigation Act, 1894, as amended by ch. 33 of the statutes of 1895, for leave to divert water from the Highwood river, which lies a short distance to the west of the town site referred to, for irrigation purposes, and to construct irrigation works and ditches in order to carry this water to certain lands which lay to the north-east of the town site, and which he desired to irrigate. On 27th December, 1897, the Deputy Minister of the Interior, Mr. Smart, issued a memorandum in which, under the provisions of the Act referred to, he "authorizes the construction, so soon as the necessary right of way

therefor has been acquired, of the irrigation works as shewn by the memorial and plans submitted by Thomas Wellington Robertson, of High River, in connection with his application for permission to divert water from the Highwood river at a point on the north-east quarter of section 1, township 19, range 28, west of the 4th meridian, for irrigation purposes, no changes or variations therefrom being deemed necessary, nor any protests filed against granting the rights applied for, the works to be completed within one year from this date." So far as the evidence shews, the only plan referred to in this authorization consisted of a plan dated 23rd August, 1897, which shewed the location of the proposed irrigation ditch, beginning at a point on the Highwood river just within the eastern boundary of section 1, running south-easterly into section 6 until it strikes what is, on the plan, apparently intended to represent one of the streets running east and west on the plan of the town site already referred to, and following this eastward to what is apparently meant to represent West Railway street, thence northerly along this latter street a certain distance, thence easterly across the railway right of way to what is intended, no doubt, to represent East Railway street, thence northerly along East Railway street to the centre line of section 6, or what is called Fourth street on the town site plan, thence easterly along this centre line of Fourth street for some distance to a point intended apparently as the intersection of Fourth street and Second avenue, thence north-easterly in an irregular direction across a small corner of section 5 and over upon section 8, which latter section was apparently owned by the testator and was the land to be irrigated. This plan does not appear to be very carefully drawn, in so far as the location of the streets of the town site are concerned. The draughtsman appears merely to have desired to indicate the existence of surveyed blocks at a point which he marks as the "town of High River," and the general course of the proposed ditch along the streets separating these blocks. The blocks, but not the lots, are only roughly indicated in this plan. For instance, only two blocks are indicated as existing between what is certainly intended as Fourth street and what is, no doubt, meant to be Seventh street. Notwithstanding these inaccuracies, however, it is plain to my mind that the draughtsman knew of the existence of the registered plan of the town site, and that Robertson intended to represent

to the Department of the Interior that the proposed ditch was to be constructed along certain streets marked upon that plan. The fact that he was himself a party to the registration of the town site plan put this, to my mind, beyond doubt. It will be remembered, however, that it was not until several years afterwards that a village was established at High River, and not until several years still later that the town municipality was organized.

Apparently the next step taken by Robertson was to approach the Department of the Public Works of the Government of the North-West Territories in reference to road allowances and public highways. On 7th March, 1898, Mr. Dennis, for the Commissioner of Public Works, issued a certificate whereby, having recited the authority from the Department of the Interior above referred to, he certified that Robertson was granted "permission under the provisions of the Public Works Ordinance relating to road allowances and public highways, to construct and maintain the canals, ditches, reservoirs, or other works, forming part of such authorized system, across the road allowances or public highways at the point or points shewn by the plans filed by the said Thomas W. Robertson in the irrigation office, subject, however, to the provisions of section 31 of the said North-West Irrigation Act."

In the year 1898 the North-West Irrigation Act was repealed, and a new Act passed, by the provisions of which some changes were made in the method of administration. The Commissioner of Public Works of the North-West Territories and the Chief Engineer of the Department of Public Works of the North-West Territories were, in effect, made by statute officers of the Department of the Interior for the purposes of the Act. Plans and memorials were thereafter to be filed with the Commissioner at Regina, and the Chief Engineer was designated as the person to make inspections and to issue certificates as to the completion of the necessary works. It does not clearly appear what further delegation of authority to the Territorial Public Works Department, if any, was made through internal regulation of the Department of the Interior. I have endeavoured to discover whether there was not some order in council passed under the authority of the Act of 1898 by which the administration of irrigation affairs was transferred to the Territorial Department, but I have been unable, after a careful search,

to find any. It appears that on 15th May, 1899, an order in council was passed rescinding all previous orders in council and regulations relative to irrigation affairs, "preparatory to the issue of new regulations in conformity to the North-West Irrigation Act, 1898" (see statutes of 1900, p. xxxii.), but I have been unable to discover any order in council fixing the new regulations. New regulations may have been issued simply by the Minister under the authority of sec. 51 of the Act of 1898, but this would, I think, have to be proved in evidence, and no such evidence was tendered. However, on 4th January, 1899, Mr. J. S. Dennis, Deputy Commissioner of Public Works of the Territories, wrote a letter to Robertson pointing out that the time limited in the authorization of 27th December, 1897, for the completion of the works, had expired, and that, unless the works had already been completed, an extension of time would have to be applied for. This was apparently done, for on 17th February, 1899, Mr. Dennis again wrote to Robertson stating that, in response to an application, "it has been decided to grant you an extension of time up to 1st November, 1899, within which to complete the necessary works in connection with your scheme for the diversion of water from High river for irrigation purposes." In the summer of 1899 the irrigation ditch was completed, and water was turned into it from the river, although as yet no final license for the diversion of water had been obtained. Some time in the year 1900 right of way plans were filed with the Commissioner by Robertson, and these plans were approved by him on 14th February, 1900, and filed in the land titles office for the South Alberta land registration district on 14th March, 1900, and marked as "Irr. 35." This plan shews the course of the ditch commencing at the intake just within the eastern boundary of section 1, crossing the road allowance between sections 1 and 6, and going south-easterly till the western end of Seventh street on the surveyed town site already referred to is reached, crossing the surveyed Macleod trail on the way. From the intake to Seventh street the right of way is coloured pink on the plan, and bears upon it marks of measurement of angles and distances, apparently for the purpose of enabling the exact location of the ditch and right of way on the ground and acreage thereof to be ascertained. Within the pink strips there are two parallel dotted lines, intended, I have no doubt, to indicate the location of the

actual ditch itself. These dotted lines, but neither the pink strip nor the marks of angles and measurements, are continued eastward upon Seventh street, northward on West Railway street to Sixth street, then east across the railway right of way to the west side of East Railway street, then north along the west side of this street to a point somewhat north of Fifth street, then at an angle north-easterly across East Railway street to the corner of Fourth street and East Railway street, then easterly along the south side of Fourth street to the east side of Second avenue, i.e., to the very eastern boundary of the original town site plan, then north along the east side of Second avenue to a point opposite the eastern end of Second street, where the dotted line again leaves the streets altogether, and turns north-east again upon private property. From this point the pink strip again begins, and, with the two parallel dotted lines still in its centre, and, with the marks of angles and measurements again appearing, proceeds north-easterly through the north-east quarter of section 6 to the eastern boundary of that section, where it again crosses the road allowance between sections 5 and 6, and passes on through the latter section. On 15th June, 1900, Robertson obtained from the registrar of land titles a certificate of title, No. A J 240, certifying that he was the owner of an estate in fee simple of and in "all those portions of the north-east quarter and south-west quarter of section 6, township 19, range 28, west of the 4th meridian, in the district of Alberta, occupied as right of way for an irrigation ditch, as the same is now located and constructed and shewn on 'Plan Irr. 35,' of record in the land titles office for the South Alberta land registration district, containing respectively two and eighty-one hundredths (2.81) acres and fifty-six one-hundredths (.56) of an acre more or less." On 9th August, 1901, Robertson also obtained from the registrar a certificate of title, A P 84, shewing the same estate "in that part of the south-west quarter of section 6 in township 19, range 28, west of the 4th meridian, being right of way of an irrigation ditch across the said quarter-section, as shewn upon a plan filed in the land titles office for the South Alberta land registration district marked Irr. 35." It will be noticed that no area is specified in this latter certificate. It further appeared, although the evidence as to these facts was objected to, that this latter certificate, A P 84, was issued upon a transfer from the owner

mentioned in the preceding reference certificate, A G 61, which latter certificate covered simply that portion of the south-west quarter of section 6 lying west and north of the Macleod trail, which was not included in the surveyed town site at all. It also appeared that certificate of title A J 240 was issued upon a transfer dated 23rd May, 1900, from A. M. Nanton and J. H. Munson to Robertson, a memorandum of which transfer was indorsed on certificates of title S 52 and S 31, which latter are referred to in certificate A J 240 as reference certificates. Reference certificate S 52 shews that Nanton and Munson were the owners of certain lots in different blocks of the town site plan, and also of that portion of the south-west quarter of 6 "bounded on the north by the Macleod trail and Seventh street as shewn on the said plan," and hence of that portion of the south-west quarter of section 6 south of the Macleod trail, through which the pink strip shewn on the right of way plan (Irr. 35) ran, while reference certificate S 31 shewed that they were the owners of certain other lots according to the town site plan, and also of that portion of the north-east quarter of section 6 lying north of the production easterly of Second street, and hence of that portion of the north-east quarter through which the pink strip shewn on the right of way plan (Irr. 35) ran. It will thus be seen that none of the reference certificates, upon which certificates A J 240 and A P 84 were based, covered any portion of the streets which are shewn on the town site plan, and along which, on the right of way plan (Irr. 35), the mere dotted parallel lines already referred to run. It also appeared from the evidence of the registrar, also objected to, that no transfer had ever been made by Ikin, who was the registered owner of the south half of section 6 at the date of the filing of the town site plan, of any portion of the land marked as streets on plan. It would, therefore, appear that Ikin is still the registered owner of the fee simple in that portion of East Railway street where the filling in was done, this being, as already stated, at the extreme north-east corner of the south-west quarter of section 6, and also of the fee simple in at least the south half of Fourth street, unless, as was contended by the plaintiff, certificates of title A J 240 and A P 84 are conclusive and irrebuttable evidence that the testator is the registered owner of the fee simple on that portion of the said street covered by the parallel dotted lines already referred to.

During the years 1901, 1902, 1903, and 1904, it appears the ditch was at times full of water, but how frequently or from what cause was not clearly shewn. It was shewn that the earlier of these years were very wet seasons, and it was suggested that the water in the ditch arose from this cause. At any rate, there was no very definite evidence that the ditch was actually used for irrigation purposes until the year 1905. Prior to this, namely, on 29th January, 1903, Robertson died, and the plaintiff was granted probate of his will as executrix on 17th February, 1903. In the year 1901 the village of High River had been established by order in council under the provisions of the Village Ordinance then in force. On 6th October, 1903, the plaintiff made application in writing to the Commissioner of Public Works of the Territories "for the right to maintain and operate along the streets of the town of High River the irrigation ditch already constructed along the said streets, as the course of the said irrigation ditch is shewn upon the plan already in your office under the irrigation file 466." On 3rd June, 1904, the Commissioner of Public Works issued an authorization whereby, after a recital of the application to divert water under the Irrigation Act, the plaintiff was "granted permission, under the provisions of the Public Works Ordinance and the Village Ordinance relating to road allowances and public highways, to construct and maintain the works forming part of such system upon and along the streets and lanes of the village of High River at the point or points shewn by the plans filed by the said T. W. Robertson, now deceased, in the Irrigation Office at Regina, subject, however, to the conditions undermentioned, viz.:—

"1. That the irrigation ditch and works in connection therewith shall be constructed and maintained by the said Marie A. E. Robertson.

"2. That the said irrigation ditch shall be piped or flumed for the whole length of the said ditch along and across any street or lane in the said village of High River, and such pipe or flume shall be constructed of such material as will prevent seepage and the flooding or damaging by water of any lot or lots or of any cellar or basement of any building erected on any lot or lots on any street or lane along which such pipe or flume is constructed, or of any such street or lane, and such pipe or flume shall be placed below the grade line of such street or lane, and covered in so as to form

no obstruction to public travel, or to the construction and maintenance of public works in the said village.

"3. That whenever it is deemed by the Commissioner unnecessary for the said irrigation ditch to be wholly piped or flumed, or to be wholly covered in as provided by clause 2 of this authorization, it shall be the duty of the said M. A. E. Robertson to provide and maintain proper and sufficient coverings over such open ditch between and in front of any lot or lots, and any street or lane along which such ditch is constructed when required by the owner or overseer so to do or when notified in writing by the Commissioner so to do.

"4. That in the event of any damage being caused by the action of water, or in any way by reason of the construction or use of the said ditch along or through any such street or lane, such damage shall be repaired or remedied by the said M. A. E. Robertson.

"5. In the event of the said M. A. E. Robertson abandoning or ceasing to use such ditch for the purpose for which it was constructed, it shall be filled in by the said M. A. E. Robertson to the satisfaction of the Commissioner or the overseer of the said village."

With the terms of this authorization the plaintiff did not comply, on the ground, no doubt, as pleaded in the defence to the counterclaim, that the Commissioner had no authority to attach the conditions mentioned. During the summer of 1905 the ditch was used for irrigation purposes by the plaintiff, although even yet she had obtained no license to divert water from Highwood river.

In February, 1906, High River was erected into a town under the provisions of the Municipal Ordinance, the area comprising the whole of section 6.

On 12th June, 1906, Mr. John Stewart, who is described as Commissioner and Chief Engineer of Irrigation, acting no doubt under the provisions of sec. 24 of the Act of 1898, issued a certificate in which it is certified, among other things, that an inspection had been made of the irrigation ditch and structures constructed by the late T. W. Robertson, as shewn by the memorials and plans filed by him on 23rd August, 1897, 13th June, 1902, and on 8th October, 1903, and that it was found that the ditch and works connected therewith had been constructed and completed in accordance with the memorials and plans mentioned; that the necessary

right of way for the works across land not owned by the executrix had been obtained, and authority to construct the works across road allowances or surveyed highways had been granted; that the irrigation works were capable of utilizing the water applied for; and that therefore the executrix was entitled to a license for the quantity of water out of Highwood river mentioned in the certificate.

During the summer of 1906 trouble arose between the municipal council and the plaintiff in regard to the existence of the ditch on what the council claimed were public streets of the town. All along the south side of Fourth street stores and places of business had, during the past 2 or 3 years, been erected, to reach which from the street the ditch had to be crossed. The plaintiff had built some bridges across the ditch, one on East Railway street, one at the junction of Second avenue and Fourth street, and one where the bridge crosses Second street. The first mentioned bridge was not, however, built in the middle of the street. At that point the ditch crosses the street diagonally, and the bridge, which is described as a "double" one, i.e., two bridges side by side, lay very close to the property line on the east. When a building was constructed at the corner of Fourth and East Railway streets, it became inconvenient, so the defendants allege, to cross the bridge as it stood. On 5th September, 1906, the town council passed a resolution as follows: "Moved by P. Taylor, seconded by G. D. Stanley, that East Railway street be made passable by filling the ditch, also opposite lane on Fourth street. Carried."

On 7th September men in the employ of the town and under the supervision of the chairman of the public works committee, proceeded to fill and did fill in the ditch on East Railway street as directed in the resolution. This action was begun the same day. On 31st October, 1906, the final license to the plaintiff to divert water from the river was issued by the Minister of the Interior, in pursuance of the certificate of Stewart and the provisions of the Act. This was some time after the commencement of the action, and the next day after the plaintiff had filed her defence to the counterclaim.

I have omitted so far any reference to certain facts, such as the date and extent of travel on the surveyed streets as shewn on the town site plan, the date and extent of improvements made on these streets by public authority, the extent

of building along the streets, etc., as to which the evidence is not so clear. These will, in my view, become very important and must be dealt with, but it will be best first to deal with the documentary evidence and the arguments based upon it.

At the close of the plaintiff's case, Mr. Walsh moved for nonsuit, on the grounds, first, that by the authorization of 27th December, 1897, the work was to be completed in one year; that this was not done; that the letter of the Deputy Commissioner of Public Works of 17th February, 1899, assuming to extend the time, was issued without authority; that by sub-sec. 2 of sec. 20 of the Act it is the Minister only who can grant such extension; and that, therefore, in 1899 all authority to construct the works had lapsed; second, that the original authority of 27th December, 1897, was subject to the condition that the right of way should first be obtained; that certificates of title A P 84 and A J 240, which are the only evidence of right of way, were issued only after the construction of the ditch; and that in any case they shew no title in the plaintiff to the locus in quo. I refused the nonsuit, and at the close of the case these arguments were renewed.

I do not think the contention of the defendants on the first point can be sustained. In his letter of 17th February, 1899, Mr. Dennis does not pretend to act on his own authority. He simply conveys certain information to Robertson, namely, the fact that it had been decided to grant the extension of time. He does not himself grant the extension. The letter comes from him as Deputy Commissioner of Public Works of the Territories. By the Act of 1898 the office of the Commissioner is clearly for irrigation purposes made a branch of the Department of the Interior. It is in this office that plans and memorials must be filed. It is by the Chief Engineer of the Department that inspections are to be made and certificates granted as to the progress of construction work. The admission of the letter in evidence was not objected to, and, in the absence of evidence to the contrary, I am of opinion that it must be presumed to have been written upon proper authority. It is evidence, no doubt the best available, that a decision to the effect stated was made. It should be presumed, I think, also that the decision was made by the person authorized by the Act to make it, that is, by the Minister himself, and that the Deputy Commissioner was

merely the official means of communication adopted for the purpose of conveying a knowledge of the decision to Robertson. This view makes it unnecessary to consider fully the effect of the many subsequent acts of the Department of the Interior down to the issue of the final license of 31st October, 1906, which appear to constitute a waiver of the forfeiture, if any, resulting from the failure to complete the works by 27th December, 1898. Possibly the Department had no authority to waive it; but, if that is so, then surely it must have had the power to issue a new authority. The distinction between this latter and an implied confirmation of a previous authority resulting from repeated acts of recognition of that authority, seems to me to be rather fine, particularly in a matter of the departmental administration of such an Act as that in question, in which no particular form of authority is prescribed. It is only as evidence of an implied confirmation of the original authority that the final license of 31st October, 1906, issued after action commenced, is to my mind of any great significance. If it had been a question of property rights in the actual water in the ditch, the license would have been important. Under the scheme of the Act, there is a clear distinction to be drawn between the grant of the right to appropriate a certain portion of the water of a river, which is all the license does, and the grant of authority to construct and operate the ditch through the private property of third persons. The latter authority is of the same nature as the powers granted to railways by their incorporating statutes. Under sub-sec. 2 of sec. 24 of the Act of 1898, the grant of license cannot be made at all until the works have been completed and a certificate to that effect issued by the engineer. It is clear, therefore, that the authority to construct the works cannot rest in any way upon the license, and therefore that little, if anything, depends on the fact of the license not having been issued until after action was begun, unless, as I have said, to the extent of shewing confirmation of the authority to construct the works, if the authority ever did lapse, and perhaps also in this respect, that doubt might be cast upon the complete user of the ditch as an irrigation ditch prior to 1906, owing to the fact that whatever water was taken for that purpose was taken without authority. It will be observed, moreover, that the authority of 27th December, 1897, was issued, not

under the Act of 1898, but under the Act of 1894, as amended by that of 1895, and that, as the Act stood in 1897 after the amendment, there is no direct reference to the imposition of a time limit in the first instance, except in a class of larger ditches within which the ditch in question does not fall. But it will probably not be questioned, indeed it was not questioned, that the Minister had power under sub-sec 5 of sec 13A of the amended Act to impose the conditions he did, viz., the securing first of the right of way and completion within one year. As to the last condition, I hold, for the reasons given, that the time was properly extended.

Coming now to the second objection. To this it was answered that certificates of title A P 84 and A J 240 were final and conclusive, and that they shew good title in the plaintiff to the land covered by the ditch along the streets marked on the town site plan and on the right of way plan. Now, these certificates of title must be read in conjunction with the plan Irr. 35, to which they refer. In my view, it is possible to dispose of this question without the necessity of going behind these certificates and the plan itself, and, therefore, without deciding the question of the admissibility of the evidence which was tendered as to the reference certificates and the transfers. The certificates certify to a title in a right of way as shewn on the plan. The question is, what is shewn on the plan? What portion of the land covered by the plan must the Court infer from the plan itself to have been intended as "right of way?" I was not referred at the trial to any order in council regulating these plans, but in the volume of Dominion statutes of 1895 I find an order in council printed which was passed on 11th October, 1894, and which deals in detail with the requirements in connected with preliminary and right of way plans and surveys, and which provides that all right of way plans to be filed under the Act "must shew the width and area of right of way included within the boundaries of each quarter section." This order in council continued in force at any rate until 15th May, 1899. I have been unable to discover whether any changes were made upon the point in question by any order in council passed under the new Act, but I think I may infer that some such regulation must have continued to exist. At any rate, the order in council is instructive as shewing what would probably be required in such a

plan as that before me. There may a question whether, as the order in council was not produced at the trial, I have a right to look at it; but it seems to me that by the Canada Evidence Act, sec. 21, orders in council are placed in practically the same position as statutes when they are printed with statutes. Now, it is clear that the mere parallel dotted lines shewn on the plan along the streets of the town do not comply with the regulation mentioned. It is plain to any one, and Thorold, the engineer, so swears, that there are no measurements of any kind on the plan referring to these dotted lines, so that it is impossible to calculate the area covered by them. If, therefore, the plan was made under any such regulation as that mentioned, it is clear that the portion included between the dotted parallel lines could not have been intended to be indicated as part of the right of way. And, even if I cannot look at the order in council, I am satisfied from the plan itself and from the evidence of Thorold, that there was no such intention, and that such is not the meaning of the plan. Certificate of title A J 240 states that the part of the south-west quarter of section 6 shewn on the plan as right of way contains fifty-six hundredths (.56) of an acre, more or less. Thorold swears this is the exact area covered by the pink strip shewn on the plan south of the Macleod trail. Certificate of title A P 84 specifies, indeed, no area, but it seems to me not unreasonable to imagine that this certificate may have been intended to include not only the pink strip north of the Macleod, but also the space between the dotted lines up to the corner of Fourth street. Then, why should the right of way for a portion of the distance be of a certain defined and measured width and coloured pink, and then for another portion be much narrower, uncoloured, and unmeasured? And why should it be shewn, not between complete lines, but between dotted lines? The significance of dotted lines on such a plan is well known. They generally signify something that really is not there at all, but only something that might be there, or else something which, although in fact there, has really no legal right to be there at all.

It was contended by counsel for plaintiff, however, that one certificate read not merely "as shewn on the plan," but also "as occupied as a right of way," and as "now located and constructed," and that the actual markings of the ground are important. We must recall again the exact words

of certificate A J 240. The land described in that portion of the quarter section "occupied as right of way for an irrigation ditch as the same is now located and constructed and shewn on plan Irr. 35." It will not, I think, be suggested that these words can be read disjunctively so as to mean, first, "a right of way as now located and constructed," and, second, "a right of way as shewn on plan Irr. 35," and that this latter refers to the pink strips, and the former to the actual ditch on the streets, without reference to the plan at all. This interpretation of the words of the certificates would, I think, be absurd. The words of the certificates plainly mean, to my mind, that the whole right of way intended is "shewn on the plan." Whatever is not "shewn on the plan" is not, in my opinion, intended to be described, no matter what there may be existing on the ground itself, with no means of being exactly and permanently located. That being so, I cannot accept the mere dotted lines as indicating a right of way. The absence of colour and of measurements, which would be a permanent record of the right location, and the very fact of the dotting itself, instead of drawing continuous lines, leads me irresistibly to the conclusion that the draughtsman did not intend by them to indicate that the space between them was part of the right of way of which he was furnishing a plan. It is for the Court to construe and interpret the plan as it would any other written document, and, for the reasons given, and quite aside from the order in council and from the evidence as to reference certificates and transfers, I am fully satisfied that the only portions of land which were intended by the plan to be indicated as the right of way are those contained between the complete lines, for which measurements are given and which are coloured pink. If any confirmation further were needed as to this interpretation of the plan, it is given by the fact that the certificates do not refer to the south-east quarter at all, although the ditch is constructed along Fourth street on that quarter. The defendants raise the question of the whole ditch, and not merely the spot where the filling was done. I rather think that the plaintiff would have put in a certificate as to the south-east quarter if she had one. The result is that the certificates of title do not disclose any title in the plaintiff to any portion of the land indicated and marked as streets on the town site plan 2345 E, and on the right of way plan Irr. 35.

Having come to this conclusion, there can be no doubt of the admissibility of the registrar's evidence to the effect that no transfers were ever registered in respect of any of the lands shewn on the town site plan as streets. Therefore, in so far as the streets are concerned, the fee simple still remains in the persons who registered the plan; for streets on the south half, the fee simple is still in Ikin, and for streets on the north-east quarter, the fee simple is still in Lane. Now, in what position does this place the plaintiff? Unless she can shew some license or authority from a person entitled to give it, she is surely a trespasser upon these lands marked on the plan as streets.

First, there is the certificate of Mr. Dennis of 7th March, 1898. I do not see how this can be of any assistance to the plaintiff. The plans shew several regular road allowances to be crossed by the ditch, quite aside from streets within the town site area. I am satisfied that the permission granted in this certificate refers only to this road allowance and to no other. The permission is "to construct and maintain the canals, etc., across the road allowances and public highways at the point or points shewn" on the plans. This language is not applicable to a ditch which enters a street at one point, then runs several hundred yards along it, and leaves it at another point, even though eventually it emerges on the farther side of the street. That is not going "across" at "a point." If I enter the Bow river in a boat at Calgary on the south side and float down to Gleichen and land there on the north side, I can scarcely be said to be going "across" the river at "a point." The reference in the permission to sec. 31 of the Irrigation Act, 1894, I think, confirms this view. Mr. Varley argued that secs. 16 and 37 of the Act of 1898 evidently contemplate the possibility of the ditch going on highways otherwise than directly across, but there is certainly nothing to suggest this in sec. 16. In sec. 37 the words "extending into" are used. They are, however, not used in the permission given by Mr. Dennis, and it is this document and not the statute that I have to interpret. But, if necessary, I would hold that even the words "extending into" could not apply to the present case. They evidently refer to a case where the requirement of proper levels necessitates the extension of the ditch for a short distance upon the highway, and thence back again to the private property on the same side without crossing com-

pletely. They cannot possibly refer to the case of a ditch purposely constructed for a long distance throughout the devious course of a large number of streets, and avowedly following the street lines as such. A finical mind might argue that at any rate the ditch crosses East Railway street at the spot where the filling-in occurred, but I am quite convinced that the permission refers solely to the case where the ditch emerges from private property on one side and crosses directly to private property on the other at a definite point of the highway.

Besides, the permission of Mr. Dennis refers only to public highways and road allowances. The latter expression "road allowances" refers, I think, only to the allowances made for roads on the regular government survey, and not to allowances made on any private plan; while with regard to the expression "public highways," it must, I think, be held to apply only to what were public highways at that date, viz., 7th March, 1898. I cannot think it reasonable to construe the permission to mean that Robertson was given in advance the liberty of crossing or going along any piece of land shewn on the plan that might afterwards become a public highway. The plan, moreover, is very rough and obscure as far as the streets are concerned. It is impossible for me to believe, on looking at it, that Mr. Dennis then had in his mind any thought of granting a permission to construct the ditch along the public highways of a village or town. Although the plan bears the words "the town of High River," there was then no town, not even a village, there at all, in the sense in which those words would naturally be understood by a departmental officer acquainted with the Territorial Ordinances. I am convinced that Mr. Dennis did not look upon the faint markings on their plan as indicating the presence of public highways at all, and did not for a moment consider that there were at that point any public highways over which he had any control or authority. And, whatever he may have thought, if, as a matter of fact, there were none except the Dominion road allowances, then his permission could not apply. Upon this point the plaintiff was, of course, obliged to blow both hot and cold. In the statement of claim she alleges that the ditch runs "in and along certain streets of the now town of High River," while in her reply to the counterclaim she asserts that "no part of the right of way or of the ditch passes along or across any public

highway or street within the defendant municipality, and that no part of the land taken, used, and occupied by the said ditch and works within the municipality ever was or is a public highway." This inconsistency re-appeared in the argument. If the last position be true, then certainly these were not public highways in March, 1898, and the permission of Mr. Dennis cannot apply to them. Of course, the defendants were in the same predicament. Mr. Walsh argued that the mere filing of the town site plan in 1893 was sufficient to constitute the streets shewn on it public highways, but the authorities do not bear out that contention. It is clear that something more than mere registration of a plan is necessary. In Roche v. Ryan, 22 O. R. 107, and McGregor v. Village of Watford, 13 O. L. R. 10, 8 O. W. R. 479, there was a special statute declaring that upon subdivision into lots and sale according thereto, the streets shewn became public highways. This was only in incorporated cities, towns, and villages. The case of Moore v. Woodstock Woollen Mills Co., 29 S. C. R. 627, lays down the principle plainly that there must be either acceptance by some public authority or user by the public. Such cases as Re Waldie and Village of Burlington, 13 A. R. at p. 111, and Sklitzsky v. Cranston, 22 O. R. at p. 594, and many others, confirm this view. The case of Daly v. Robertson, 1 Terr. L. R. 427, went further than was necessary for the decision given, as it was merely a case between the vendor and purchaser; it is in conflict with the decision in 29 S. C. R., and can easily be supported on the narrower ground laid down in Sklitzsky v. Cranston, 22 O. R. at bottom of p. 594.

Section 121, sub.-sec. 2, of the Land Titles Act, 1894, which was then in force, was obviously intended only to protect the rights of purchasers as againt the vendor filing the plan, and is simply confirmatory of the common law rule that when a vendor sells according to a plan prepared by him shewing streets marked thereon, the purchaser can prevent him from closing or disposing of the streets shewn. The Act does not say, as the Ontario statutes did, that the streets shewn become ipso facto public highways. If they did, it is difficult to see why a Judge should have been given power to alter them. Such a power usually rests in the municipality or government. See Re Waldie and Village of Burlington, 13 A. R. at p. 112.

Now, there was no municipality in existence in 1898 to accept dedication, and there is no evidence that the Territorial government had, up to that time, done anything shewing acceptance on behalf of the public. Neither is there any sufficient evidence of user by the public up to 1898 such as would constitute acceptance. Indeed, there is no evidence at all that up to 1898 any of these streets, except possibly Second street, which appears to have been an old trail, were used as highways at all. The evidence shews pretty plainly that there was no building, except perhaps one shack, on the ground east of the railway, and that the public went freely across all the ground in any direction they pleased regardless of surveyed lots or streets. This being so, I must conclude that on 7th March, 1898, the date of the permission, none of these streets marked on the plan had yet become public highways. Aside, therefore, from the question of the meaning of the word "across," the permission cannot have referred to them in any way.

This permission being ineffective, there is clearly nothing left for the plaintiff to rely upon as her authority for maintaining the ditch, so far as the evidence submitted on her behalf is concerned. Stewart, indeed, certifies that the necessary right of way has been obtained, but in this suit that is for the Court to determine. He, doubtless, in issuing the certificate, relied upon the conditional permission of 3rd June, 1904. This permission is, however, repudiated by the plaintiff on account of the conditions attached. It was put in evidence by the defendants, and will have to be considered; but, as far as the plaintiff's case is concerned, she does not rely upon it in any way. There is finally no evidence of any license or authority from Ikin or Lane, who are still the owners of the fee simple. The result is that there is no evidence whatever that, so far as the streets are concerned, the plaintiff has ever complied with the first condition mentioned in the authorization of 27th December, 1897, viz., the acquisition of the necessary right of way, excepting of course the permission of 3rd June, 1904, upon which the plaintiff does not wish to rely.

Now, it is contended by the plaintiff that, without relying upon this latter permission, and without shewing any paper title or giving affirmatively any evidence of a license from the owners of the fee simple in the streets, she is entitled to ask the Court to assume, in the absence of evidence

to the contrary, of which there is none, that she was acting lawfully, and that she did what she did with the consent of the owners of the fee simple. In order to succeed in this argument, she must, of course, shew that at least up to the date of the construction of the ditch no public authority had accepted the dedication of the streets, and that there had been no acceptance by user. I have already decided that up to 1898 there had been no acceptance, and I think the same would apply up to 1899; but, even though this be true, I doubt if the Court can make the assumption which it is asked to make in the circumstances. The plan of the town site was registered in 1893, and the evidence is clear that a considerable number of lots in blocks 11 and 12, which both adjoin East Railway street and Fourth street, were sold by the original owners long before the authorization of 27th December, 1897.

Now, the cases I have already cited shew clearly that as between the person registering the plan and the person purchasing from him according to it, the latter acquires the right to insist at least that the streets shewn on the plan as adjoining his lots shall not be closed up or alienated to other parties by the vendor. The purchaser, while he cannot insist on the vendor constructing the highway, can insist on being allowed to use it as it stands for himself. Now, if the vendor were to grant to a third party, not, indeed, a title in fee simple to a portion of the street, but a license to construct a large, open irrigation ditch along and diagonally across it at an important point so as to render the street much less convenient for the purchaser's use, it seems to me that this would be just as serious an infringement of the purchaser's rights as if he had sold the fee simple. The Court will not presume, I think, that the original owners of the fee who registered the plan did a thing which they would have no legal right to do, and this, I think, they would have been doing if they had granted a license to Robertson to construct the ditch. In order to exhaust to the utmost limit the remotest possibility of license or authority, one might, perhaps, consider the contingency of both the original owners and the purchasers of the lots uniting in a consent or license. This would be, to my mind, an impossible presumption to make in the circumstances. It is the present town council representing the taxpayers who are attacking the rights of the plaintiff. Some of the lot owners appeared as witnesses

for the defendants and complained of the existence of the ditch, and a great many resales have evidently been made. Besides, sec. 121, sub-sec. 2, of the Land Titles Act, 1894, already cited, clearly implies that if sales have been made the plan is binding. Even with the consent of purchasers, it would only be by order of a Judge that any alteration in the plan could be made. This order would, I think, have been registered and shewn as affecting the parts indicated as streets on the plan. The registrar's evidence is, it appears to me, sufficient to shew that nothing of the kind was ever done.

Even if there was such a presumption in the circumstances, I cannot but think it is sufficiently rebutted by the application made by the plaintiff on 6th October, 1903. That application may not, as an admission, be sufficient in itself to establish the fact that the streets were public highways in that year, but it seems to me it is at least sufficient to counteract the presumption which I am asked to make. If Robertson had ever made such an arrangement with the lot owners as is suggested, why should it have been necessary to apply to the Department of Public Works for permission to maintain the ditch upon the streets? In these circumstances, I cannot think it reasonable to entertain for a moment the possibility of any such presumption as that suggested.

I am, therefore, driven to the conclusion that, aside from the permission of 3rd June, 1904, the plaintiff and her testator are mere trespassers, so far as that portion of the ditch is concerned which is situated on and marked as streets on the town site plan.

I have also come to the conclusion that all the streets marked on the town site plan along which the ditch runs were, in the summer of 1906 and before the filling was done, public highways under the control of the defendant municipality.

It was suggested on the argument that a village established under the Village Ordinance had no authority to accept dedication of a public highway. That is, no doubt, true in the sense that a village is not a corporation vested with jurisdiction and responsibility. But the public generally may by mere general user accept dedication, and surely whatever is done by such authorities as the village overseer and the meeting of ratepayers provided for in the Village Ord-

inance, should constitute better evidence of acceptance by the public than simply indiscriminate user by that very indefinite body. The Village Ordinance gives the ratepayers power to assess themselves, and, through the overseer, to spend money on "drainage and street improvement:" Ordinances, 1901, ch. 25, sec. 16 (c). The whole scheme of the Ordinance seems to me to be to constitute the overseer and meeting of ratepayers a local authority, under the control, no doubt, of the Department of Public Works, for the purpose of public improvements of various kinds; and, while no jurisdiction such as is vested in a municipality may exist, yet certainly if the overseer and ratepayers tax themselves and spend money on a piece of land dedicated as a street, that is the strongest possible evidence of user and therefore of acceptance by the general public. Now, the evidence is clear that already in 1902 the village authority had spent money on West Railway street, and that some time in 1904 money had been spent for a sidewalk on Fourth street. In 1903 grading was done on West Railway street. And there is evidence that the village put in a bridge on Seventh street, though the exact year is not mentioned. In Gooderham v. City of Toronto, 21 O. R. at pp. 149 and 150, Rose, J., lays down the principle that it is not necessary in a case such as this that each particular street must be separately accepted, but that acceptance of a part of the streets shewn on a plan constitutes an acceptance of the whole, and that by improving some of the more important ones, the public authority must be thereby held to have accepted all the streets indicated on the plan. This is, I think, a reasonable principle to adopt in a new country like this. The work done by the village authorities indicates an intention on the part of the general public to accept the streets shewn on the plan as highways. The very creation of the village by the Lieutenant-Governor in council, moreover, seems to me in itself to indicate an intention to assume control of the streets shewn on the plan of the ground where the village was located. I therefore hold that prior to 3rd June, 1904, all these streets had become public highways.

Even then, however, I have doubted much whether the Commissioner of Public Works had authority to permit such a use of a public highway as is involved in the construction of an irrigation ditch along it. It is by no means clear to my mind that the Public Works Ordinances go that far. When

a piece of land is dedicated as a highway and the public accept it as such, it seems to me that it ought to require rather specific statutory authority to enable any department of the Government, not merely to improve it as a highway and remove obstructions therefrom, not to close it up entirely as useless to the public, but while retaining it as a highway to divert a portion of it to the exclusive use of a private person. I think, however, though with reluctance, that the authority may be gathered from the general wording of secs. 7, 12, 13, and 28 of ch. 4 of the Ordinances of 1901. It follows necessarily that the Commissioner had power to impose such conditions as he thought proper to protect the interests of the public, and that, the permission itself being valid when it issued, the conditions attached to it were also valid.

The plaintiff, however, refused to accept the conditions. She evidently repudiated them, and in her pleadings still continues to do so. I have held that she had no right on the streets at all except under this permission with its conditions attached. This permission was necessary to bring her within the condition of the original authority of the Minister of the Interior of 27th December, 1897. She would, I think, in the circumstances, be entitled to a reasonable time within which to perform the conditions, but was she entitled to stand idle for two years and leave the ditch in its original state? I should have been pleased if I could see any ground upon which to give her still the benefit of this condition, but I cannot see how she could expect it to continue indefinitely. Indeed, I think until the condition was performed she acquired no permanent rights at all. Then came the transfer of authority in February, 1906, when the municipality was created. All jurisdiction over the streets was thereupon vested in the municipality. Whatever rights the plaintiff had acquired, I think she could retain. But had she acquired any? What she had been given was a mere license with conditions attached. She rejected the conditions. It seems to me that constituted a rejection of the license in toto. Counsel, not perhaps anticipating the exact combination of conclusions on the various points at issue at which I have arrived, did not deal particularly with what was involved in the transfer of jurisdiction, and I have been unable to discover any direct authority. But, applying to the facts as I find them the best judgment I can, I am unable to

see how I can now relieve the plaintiff from the consequence of her actions. If she had accepted the conditions, had not "failed," as was said by the Privy Council in Plimmer v. Mayor of Wellington, 9 App. Cas. at p. 709, "to assert any right she possessed," if she had expended money on the faith of the license, then I think the principle of the case cited would have given her protection and preserved her rights against the new authority. But the contrary is the case entirely here. Therefore, I think any rights she may have had had elapsed before the creation of the municipality, and that as against it she is still a mere trespasser.

It follows that the defendants had a right to proceed to remove the obstruction existing by virtue of this trespass upon East Railway street. This, I think, they could do without the necessity of the formality of a by-law.

What I have written is perhaps inordinately long, but possibly the detailed statement of facts at least may be of use in case of an appeal.

The plaintiff's action will be dismissed with costs, and judgment will be given for the defendants in accordance with the first and second prayers of the counterclaim with costs.

BRITISH COLUMBIA.

(VICTORIA.)

JULY 17TH, 1907.

FULL COURT.

OPPENHEIMER v. SWEENY.

Executors and Administrators—Moneys Collected by Executors—Partnership—Trust — Money Had and Received—Agreement—Estoppel.

An appeal by defendants Sweeny and Isaac Oppenheimer from the judgment of MARTIN, J., dated 15th November, 1906.

The action arose out of the business dealings of Oppenheimer Bros. Ltd., and was brought by the plaintiff, widow of a brother of David Oppenheimer, deceased, to obtain payment to her of one-third of the amount received by the defendants from the Bank of Montreal and the Canadian Bank of Commerce, under a certain agreement dated 7th September, 1901. This agreement, which was entered into between the two banks named and the executors of the will of David Oppenheimer, was, in effect, to authorize the banks to take proceedings to recover an amount earned by David Oppenheimer in his lifetime from Sperling & Co., of London, in respect of the sale to them of certain street car and lighting franchises, the proceeds of such amount, when recovered, to be divided into three equal parts: one to the executors of the will of David Oppenheimer as trustees for the benefit of his daughter Flora, and the other two-thirds to be divided equally between the two banks. The amount was duly recovered, and the division was made in pursuance of the terms of the agreement, and it was the intention of the trustees to pay the one-third to the daughter, when the plaintiff commenced this action, basing her claim on an agreement between Oppenheimer Bros. Ltd. (of which firm the plaintiff's husband was a member), in which it was agreed that the parties thereto should be equal partners in all property standing in their names either jointly or severally. She, therefore, set up that the agreement between the banks and the executors was invalid.

The trial Judge came to the conclusion that in the Sperling transaction, David Oppenheimer had acted in behalf of the partnership, and, although his name only appeared in the various stages of the dealings, yet the two co-partners were equally interested; that, although David's executors properly received his one-third share of the money recovered from Sperling & Co., yet the provision that they should pay it to the daughter was one they could not rely upon in answer to the plaintiff's claim, and the money so received as his share should be administered as part of his estate. It was therefore ordered that she be paid one-third of the moneys recovered.

Defendants Sweeny and Isaac Oppenheimer appealed on the grounds (inter alia) that a fixed sum should not have been paid to the plaintiff without taking into con-

sideration other obligations; that there should have been directed an accounting to be taken as between David, Isaac, and Lena Oppenheimer as partners; that the executors could rely on the agreement between the two banks and themselves with respect to the disposal of the moneys received from Sperling & Co.; and that the executors received the money, not as the executors of the will of David, but as trustees for his daughter.

Wilson, K.C., and Bloomfield, for the appellants.

J. Martin, K.C., for the plaintiff.

The judgment of the Court (HUNTER, C.J., MORRISON, J., CLEMENT, J.), was delivered by

HUNTER, C.J.:—Notwithstanding Mr. Wilson's strenuous argument, I am unable to see any ground for interfering with the judgment.

The plaintiff, Lena Oppenheimer, brings an action for her share of moneys collected by the executors, and now in their hands, in a proceeding instituted by them on behalf of their deceased partner, David, in respect of a claim which was admittedly a partnership and not an individual claim, and the only defence put forward by the executors is that they had agreed under seal with the two chief creditors of the partnership that the moneys in question should be paid to David's daughter Flora.

It was urged by Mr. Wilson that, even assuming that this agreement could not bind Lena's interest, at most the executors could not be sued in this action, as the money had become impressed with a trust in favour of Flora, but that the only remedy now open to Lena was an action for a devastavit. The answer in that what David could not do, his executors could not do, and it is clear that David could not have excluded Lena, by any such agreement, to which Lena was not a party, from her share of the fruits, and created himself trustee thereof for Flora, and the moneys not having yet reached Flora's hands, the cause of action is the ordinary one for money had and received.

It was also urged before us that, as there may be outstanding debts, at any rate the judgment should be varied.

As far as concerned the two creditors in question, it is clear that they are estopped by the agreement from any claim against this fund, and as far as any other debts were concerned, no such case was raised in the pleadings, nor is there any suggestion of it in the evidence.

No doubt, the executors entered into the agreement with the banks, and have defended Flora's claim to the fund under the idea that they were saving something for her out of the wreck, but I fail to see in what way they succeeded in extinguishing the interest of Lena.

The appeal should be dismissed.

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YUKON TERRITORY.

JUNE 10TH, 1907.

FULL COURT.

SIDBACK v. FIELD.

Statutes—Miners' Lien Ordinance—Retroactivity—Contract Made before Ordinance Came into Force—Work Done after—Postponement of Time for Coming into Force—Lay Agreement — Time of Expiry of Credit Given by Workmen to Laymen—Proceeds of Operation of Lay—Application to Past Debts—Assignment of Lien Debt.

Appeal by the Reliance Mining and Trading Co. of Alaska, one of the defendants, the owner of the mining claim in question, from the judgment of MACAULAY, J., allowing in part the claim for lien of the plaintiffs, or some of them, under the Miners' Lien Ordinance.

The appeal was heard by DUGAS and CRAIG, JJ.

J. B. Pattullo and J. M. Carson, for the appellants.

C. W. C. Tabor, for the plaintiffs.

DUGAS, J.:—The plaintiffs (respondents) sued to have it declared that they have a lien for their wages upon the claim of the defendant company (appellants).

There was a lay agreement between the company and Field entered into before the Lien Ordinance took effect that is, in 1904, which was to terminate in the fall of 1906

and the lien claim is for work done since 1st July, 1906, when the Lien Ordinance came into force.

The clause of the Ordinance upon which they rely more particularly reads as follows: "3. Any person who performs any work or service upon or in respect to, or furnishes any wood to be used in the working of, any placer or quartz mining claim, shall, by virtue thereof, have a lien for the price of such work or services or wood upon the said mining claim with the appurtenances thereto, the minerals or ore produced therefrom, the lands occupied thereby, or enjoyed therewith, or upon or in respect to which such work or service is performed, or for or upon which such wood is furnished, as well as upon the machinery and chattels upon such lands, limited, however, in amount to the sum justly due to the person entitled to the lien." And the main question, therefore, is whether the property of the appellant company can be affected by this Ordinance for work done thereon after it came into force, but under a contract made before.

It is such a well established principle that the presumption is that all statutory laws are to operate prospectively, and are not made to impair vested rights or have a retroactive effect, unless declared in the most explicit terms, and the intention of the legislature unmistakable, that I consider it would be idle to refer to any authority on the subject. The question, therefore, in this case, is simply whether the Lien Ordinance in force in this Territory since 1st July, 1906, affects the contract which was entered into between the defendant Arthur D. Field and the appellant company in 1904. This contract is in the nature of what is known in this Territory as a lay agreement, by which Field, the layman, agreed to work the claim of the appellant company on shares, or at a percentage; he undertaking to pay all expenses to be incurred in such an exploitation, that is, to furnish all wood, lumber, sluice boxes, machinery, tools, materials, and supplies; in fact, to bear all expenses in connection with the mining and operating of the claim, of whatever nature or kind, it being further understood that "in no way the said laymen should have authority to bind the said company for any expense of working, mining, or operating said claim, or for any claim of whatever kind or description growing out of the operation of said claim by said layman."

The fourth clause establishes the percentage to be received by Field in the following terms: "The owner or its representative shall be entitled to receive all gold, silver, or other precious metals mined or taken out of said claim during the period of this permit, and agrees and binds itself to turn over and pay to said layman at each and every clean up 72½ per centum thereof."

There are no English authorities on the subject of mechanics' liens, which seem to have received more attention in the United States than in Canada, though in both countries its effect has been decided by the principles ordinarily regulating the interpretation of statutes. The Courts have always been very careful to limit the effect of any laws so as never to impair any vested rights or create new obligations unless the statute is framed in such a way as to make it imperative to act otherwise.

Phillips, which is an American leading book on Mechanics' Liens, says at p. 34 that "a claim of lien cannot be maintained for work done under a contract made before the lien law took effect, although the work was done after the law came into effect;" but at p. 37 we read that "where there was nothing in a statute which limited its operation to contracts made after its passage, but did limit the claim to work done after its passage, it was held, nevertheless, to apply to cases where the contract was made before its passage, if the labour was performed and the materials were furnished after such passage."

The first principle was maintained in Michigan, whilst the other is from New York Courts, but the statutes of both States are different in their wording: for instance, in New York the law reads that "any person who shall hereafter by virtue of any contract perform any labour shall have a lien," etc., which, I suppose, was interpreted as meaning any contract passed before or after the coming into force of the law, whilst in the other case it was only declared that "mechanics had a prior lien upon the lot of land on which the work was done," etc.

Our Ordinance does not go as far as the statute of the State of New York, but is rather similar to that of the State of Michigan. Everywhere it has been acknowledged that the principal effect of any lien law was to create a new remedy to better assure the payment of labour done or materials furnished, and not to create a new right or a new obliga-

tion against the owner of the land upon which said work was done or for which the materials were furnished.

Phillips, at p. 45, says: "The statute enabled the creditor to appropriate the land upon which he laboured and placed his materials, together with the structure which he erected, to the payment of his debt; but it did not add to the legal liability of the debtor arising from the contract to pay his creditor. Both before and after the passage of the Act the common law gave to the creditor the right to resort to the property of the debtor for the purpose of satisfying his demand, so that in this respect the new remedy was not different from the old. But there was one, and but one, essential difference between the two remedies. Under the statute a lien upon the property benefited by the labour and materials of the creditor arose contemporaneously with the contract, preventing alienation by the debtor to the prejudice of the creditor, and giving to the creditor a preference over all other creditors of the debtor who should subsequently acquire liens upon that property; while, by the law as it existed before the statute, no such lien was established before judgment was obtained. Now, it is plain that the statute was important to the lien creditor only in case of a contest with the grantees or creditors of the debtor, and that it did not essentially change the relations between the debtor and creditor." And at p. 46: "The statute did no more than prescribe a rule of priority and preference among creditors and incumbrancers, which was different from that given by the general law."

At p. 49: "To the same effect a lien law which applies its remedy to pre-existing contracts, so as not to alter the rights of the parties to the contract by impairing its obligation, is not unconstitutional, nor retroactive, although the remedy is changed by creating a lien on the building."

At p. 43: "If any subsequent law affect to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract in favour of one party, to the injury of the other; hence any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the constitution."

At p. 68: "It was held that a law providing that 'any person or firm, artisan, or mechanic, who may labour or

furnish materials to erect any house, shall have a lien,' etc., did not extend the lien to sub-contractors, on the ground that the provisions of the law ought to be positive and express to authorize an unlimited lien on an owner's property, where there was no privity of contract, and irrespective of the amount of the original contract."

At p. 69: "So, if the lien law enact that there shall be 'a lien for the payment of what may be due from the proprietor,' although this language is very comprehensive, and, literally read, is perhaps sufficient to embrace the claims of sub-contractors; yet it was declared that it should have a reasonable construction, and, as there was no privity between a sub-contractor and the proprietor, no liability existed on his part to pay the contractor's debts unless it was created by statute. This statute gave a lien for what might be due to any person from the proprietor. But, unless it was the object of the statute to transfer the contractor's debts to the sub-contractor, there was nothing due from the proprietor to the sub-contractor, and, of course, nothing on which to found a lien; and it, therefore, did not extend to sub-contractors."

The main principle upon which all lien laws have been founded reposed more particularly upon the benefit which the owner drew from the work done or materials furnished, increasing the value of his property, and it can be understood that some Courts have extended the same in some instances to its extreme limits in favour of the workingman or the furnisher; but in all such instances the owner had become a debtor by his undertakings towards the contractors or sub-contractors; and, even then, when the law did not make it clear that he would be in some way responsible, they refrained from binding the property of the owner for such work done or material furnished.

In this case the owner made such a contract as to remain entirely free from any obligation of payment. The effect of the work to be done, instead of increasing the value of the property, was to diminish it, and the material furnished in no way increased the value of it. The layman was to pay everything, and there never was any privity of contract between the owner and the workingman or the furnishers. There was no lien law then in existence, and the company felt perfectly secured against any obligation on its part or against any proceeding by which its property

might be held responsible for the payment of any debt contracted by the layman. It never was a debtor of the creditors of Field, and its property, therefore, never was subject to the payment of the claims of the creditors of Field in the ordinary way. The Lien Ordinance, therefore, cannot be considered as adding a new remedy in favour of these creditors, against the appellant company, as already none existed.

But it is argued on behalf of the respondents that it did not create a new remedy but a new right. Legislative powers may, in some instances, create new rights, but it must be in such express terms, and so unmistakable, that no possible doubt should exist as to the intention of the law.

In perusing the Lien Ordinance, and more particularly sec. 3, it is, to my mind, impossible to find anything therein which might justify the conclusion that a new right has been created. It purely and simply gives a lien for work done or material furnished. It gives it in such a way as to bind the claim of any owner for work done or material furnished, it is true, and in this it goes further than the ordinary principles generally guiding the establishment of liens, inasmuch as, not being a debtor, the property of the owner becomes, notwithstanding, chargeable. But because it goes as far as this, it is not a reason why the Courts should give it more elasticity in its interpretation; and, at all events, the law once passed, the owners of claims know to what they are exposing themselves in having their property worked either under lay agreements or otherwise, and they voluntarily take the consequences. But surely when, as in this case, citizens fixed their obligations, feeling perfectly secure under the existing laws, it would take very clear and binding enactments to hold them responsible for anything which they could not possibly foresee, and submit their properties to the payment of debts which they never contracted. The labourers were at liberty to work or not to work, and they cannot complain of any hardship, as they should have known their rights under the Ordinance. Besides, a mining claim, and more particularly a placer, is always worked with great chances of loss. It might be said that it is so in the majority of cases, judging from the experience in this Territory. In this case the owners, no doubt, did not want to incur any responsibility for the working of their claim. The lay agreement was passed and the large percentage granted on

that account. There being no lien law then, they felt perfectly secure, and it would be against all principles of law and justice to submit now their property to a claim which they could not foresee, unless such a responsibility were clearly established by law.

The fact that the company appellant remained proprietors of the gold, once extracted, out of which they were to pay to the layman Field 72½ per cent., does not change the position. It does not submit the company to any obligation to the creditors of Field, the contract not providing for it.

Neither, under the common law, were the company obliged to secure the payment of any debt incurred by Field in working this claim under his lay agreement. In receiving the gold, which is not money, the company were receiving a chattel which they had undertaken to divide at the percentage stipulated in the contract. It was not a debt; it was not a payment; but simply a division.

Following the ordinary interpretation of statutes as to their prospective or retroactive effect, I am, therefore, of the opinion that judgment in the Court below should have been given in favour of the company appellant, and that this appeal should be maintained with costs in both Courts.

CRAIG, J.:—Several main questions arise on the case, as follows:—

Is the Miners' Lien Ordinance retroactive or retrospective so as to affect a contract made before the passing of the Act and without any anticipation of the Act?

As to the time of the expiry of the credit given by the workmen to the laymen?

As to the payment, out of the proceeds of the operation of the lay in the year claimed for, for debts due in past years so as thereby to decrease the available fund for paying labour and wood during the year of operations?

As to what is an assignment of a lien debt?

Finally, what effect the postponing of the coming into operation of the Act has upon the question of whether the Act is prospective or retrospective?

The Miners' Lien Ordinance was assented to on 26th May, 1906, and by sec. 25 made to come into force on 1st July, 1906. In that Act the expression "layman" means "any person other than the owner who is working a mining

claim or a part thereof for an interest or share in the minerals or ore produced therefrom." And sec. 3 is as follows: "Any person who performs any work or service for or in respect to, or furnishes any wood to be used in the working of, any placer or quartz mining claim, shall by virtue thereof have a lien for the price of such work or services or wood upon the said mining claim, with the appurtenances thereto, the minerals or ore produced therefrom, the lands occupied thereby, or enjoyed therewith, or upon or in respect to which such work or service is performed, or for or upon which wood is furnished, as well as upon the machinery and chattels upon such lands, limited, however, in amount to the sum justly due to the person entitled to the lien."

The layman entered into the contract on 13th June, 1904. By that agreement he agreed with the Reliance Mining and Trading Company, the owners, to work claim number 55—old number 60—below Discovery on Bonanza, furnishing all labour, material, and machinery himself, and binding himself to have a certain class of machinery on the claim. Further, he was to furnish all wood and everything required to work the claim, and to receive 72½ per cent. of the output, the owner taking the balance. It is provided by the agreement that the owner should, at each clean-up, be notified 12 hours in advance and take over all the gold dust, turning over to the layman at each and every clean-up the 72½ per cent. to which he was entitled. By the evidence it appears that all the work claimed and the wood supplied were done and supplied after 1st July, 1906. It further appears by the evidence that enough of the gold was taken out to fully pay the working operations and wood during that year. But it appears that during the year 1905 the claim was worked under this lay and fell behind, and that some of the money, amounting to about $10,000, taken out of the ground in 1906, was used to pay the back debts of 1905; that during 1906 appropriations of payments were made by Field and particularly Moore, the wood supplier, and by Sidback, who claims for labour, upon the debt of 1906, but that afterwards, and when the parties well knew that the claim would not produce enough gold in that year to pay the year's operations and also the back debts, those appropriations were changed and the money applied upon the operations of 1905, thereby reducing the fund available to pay the debts of that year, using the output of 1906 to pay the debts on the short-

age of 1905. It further appears by the evidence that the men on the claim would give each other tabs or would tell the owner or the bookkeeper of the owner to charge them with certain moneys and credit the other men with the same sums, those sums being money which the men would lose at gambling on the claim. There is no evidence of any assignment of lien or claim being made in writing, and certainly there is no evidence of it on the record nor in the exhibits that I can find, and the claims were in this manner transferred from the one man to the other back and forward, and the miners in proving up their liens added these sums to their own claims for wages, and in their statement of claim they do not appear to claim as assignees but claim the debt as due to themselves.

The first and most important question to settle is: Is the Act retrospective? The authorities on this point are very clear. Maxwell on Statutes, p. 298, says: "The presumption is that the Legislature does not intend what is unjust, and upon that presumption rests the leaning against giving certain statutes a retrospective operation. They are construed as operating only on cases of facts which come into existence after the statutes were passed unless retrospective effect be clearly intended. It is chiefly where the enactment would prejudicially affect vested rights or the legal character of past transactions or impair contracts that the rule in question prevails. Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the legislature, not to have a retrospective operation." It is almost unnecessary to reiterate by citation of authority this principle, but some of the cases are very instructive in their bearing upon this case. The case of Clarkson v. Sterling, 15 A. R. 34, is one in point. The head-note of that case is as follows: "The defendant, who was employed as financial manager of a firm, advanced to them a large sum of money to be repaid on his giving six months' notice demanding payment on default of which the firm covenanted to assign certain securities. This notice was given on 15th January, 1885, but, although repeated demands for payment were made by the defendant, nothing was done until 19th December, 1885, when a transfer to him of certain securities

was made by the firm, who within two months made an assignment under 48 Vict. ch. 26 (O.), which came into force on 1st September, 1885. In an action by the assignee under that statute to recover back the amount realized from the securities, it was held that, whether or not the firm were in insolvent circumstances at the time of the transfer of the securities, the statute was not retrospective so as to apply to a transfer made, as this was, in pursuance of a pre-existing binding agreement for valuable consideration, and valid under the then state of the law." There is also the case of In re Roden and City of Toronto, 25 A. R. 12, and particularly at p. 30 in the judgment of Osler, J.A.; also the case of Coates v. Kelly, 15 A. R. 81; Cerri v. Ancient Order of Foresters, 25 A. R. 22, 30; also Reid v. Reid, 31 Ch. D. 402, and particularly at p. 408, the judgment of Bowen, L.J.; also The Queen v. Guardians of Ipswich Union, 2 Q. B. D. 269; and Duke of Devonshire v. Barrow Steel Co., 2 Q. B. D. 286. This case is very much in point in its bearing upon the one I am considering. There is also the case of Gardner v. Lucas, 3 App. Cas. 582, and particularly at p. 600, where in his judgment Lord O'Hagan says: "The opinion given by the Judges is decisive to this effect, that unless there is some declared intention of the legislature, clear and unequivocal, or unless there are some circumstances rendering it inevitable that we should take the other view, we ought to presume that the Act is prospective and is not retrospective. It seems to me that the ground of those opinions is very plain indeed. There are cases—English cases and I believe Scotch cases also—which take a clear distinction between matters of procedure and matters of right, as to the operation of a statute prospectively or retrospectively. In the case before your Lordships the matter is of a right created by a deed, and, unless the execution of that deed fulfilled the conditions prescribed by the legislature, no right exists under it:" the case of Eyre v. Wynn-Mackenzie, [1896] 1 Ch. D. 135; also Moon v. Durden, 2 Exch. 22, 76 R. R. 479. This is one of the leading cases and makes the principle laid down very clear, where it says: "The general rule on this subject is, as stated by Lord Coke in the second institute, 292, in his commentary on the Statute of Gloucester—nova constitutio futuris formam imponere debet non præteritis—and the principle is one of such obvious convenience and justice that it must be adhered to in the construction of statutes unless

in cases where there is something on the face of the enactment putting it beyond doubt that the legislature meant it to operate retrospectively." Also Turnbull v. Forman, 15 Q. B. D. 234; Marsh v. Higgins, 9 C. B. 551, 82 R. R. 436; Pardo v. Bingham, L. R. 4 Ch. 735; Hickson v. Darlow, 23 Ch. D. 690; Main v. Stark, 15 App. Cas. 384; Knight v. Lee, [1893] 1 Q. B. 41. This is a reiteration of the principle laid down in the former case of Moon v. Durden relating to a gambling debt.

It is argued that this Act does not impose any new duty or obligation or affect the contract; that to apply it to this contract, so far as it affects the work done after the Act came into force, is not to give the Act a retrospective operation; that so applying it only affects the remedy and not the right. This does not seem to be a reasonable argument. When the owner of the claim entered into the contract of a lay, no Miners' Lien Ordinance was in operation. He was justified in entering into a contract under the then state of the law, and in expecting the contract to be carried out under similar conditions. The Lien Ordinance here is a peculiar one and different from any Lien Ordinance in any other part of the world with which I am acquainted, in this, that it attaches the property of the owner of the claim which is not affected by the work done at all, that is, that the balance of the claim which is not touched by the operations carried on under the contract becomes charged with work done upon another part of the claim, which is of no benefit whatever to the land charged; in fact, the operation of taking out placer gold from a claim, instead of improving the claim, detracts from its value, and every hour's work put upon a placer claim, resulting in the taking out of placer gold, by so much lessens the value of the ground. In other mechanics' liens the principle upon which the lien is allowed is that it adds to the value of the thing upon which the work is done, that the increased value entitles the workman to his pay; and further such Lien Ordinances only take or provide a remedy for getting at the sum coming to the contractor from the owner, that is, it is only another way of getting at the debt owing by the owner to the contractor. Seldom, if ever, so far as I am aware, does a Lien Ordinance provide that the owner of a property upon which work is done, shall incur any liability beyond the total sum which he owes to the contractor, the sub-

was made by the firm, who within two months made an assignment under 48 Vict. ch. 26 (O.), which came into force on 1st September, 1885. In an action by the assignee under that statute to recover back the amount realized from the securities, it was held that, whether or not the firm were in insolvent circumstances at the time of the transfer of the securities, the statute was not retrospective so as to apply to a transfer made, as this was, in pursuance of a pre-existing binding agreement for valuable consideration, and valid under the then state of the law." There is also the case of In re Roden and City of Toronto, 25 A. R. 12, and particularly at p. 30 in the judgment of Osler, J.A.; also the case of Coates v. Kelly, 15 A. R. 81; Cerri v. Ancient Order of Foresters, 25 A. R. 22, 30; also Reid v. Reid, 31 Ch. D. 402, and particularly at p. 408, the judgment of Bowen, L.J.; also The Queen v. Guardians of Ipswich Union, 2 Q. B. D. 269; and Duke of Devonshire v. Barrow Steel Co., 2 Q. B. D. 286. This case is very much in point in its bearing upon the one I am considering. There is also the case of Gardner v. Lucas, 3 App. Cas. 582, and particularly at p. 600, where in his judgment Lord O'Hagan says: "The opinion given by the Judges is decisive to this effect, that unless there is some declared intention of the legislature, clear and unequivocal, or unless there are some circumstances rendering it inevitable that we should take the other view, we ought to presume that the Act is prospective and is not retrospective. It seems to me that the ground of those opinions is very plain indeed. There are cases—English cases and I believe Scotch cases also—which take a clear distinction between matters of procedure and matters of right, as to the operation of a statute prospectively or retrospectively. In the case before your Lordships the matter is of a right created by a deed, and, unless the execution of that deed fulfilled the conditions prescribed by the legislature, no right exists under it:" the case of Eyre v. Wynn-Mackenzie, [1896] 1 Ch. D. 135; also Moon v. Durden, 2 Exch. 22, 76 R. R. 479. This is one of the leading cases and makes the principle laid down very clear, where it says: "The general rule on this subject is, as stated by Lord Coke in the second institute, 292, in his commentary on the Statute of Gloucester—nova constitutio futuris formam imponere debet non præteritis—and the principle is one of such obvious convenience and justice that it must be adhered to in the construction of statutes unless

age of 1905. It further appears by the evidence that the men on the claim would give each other tabs or would tell the owner or the bookkeeper of the owner to charge them with certain moneys and credit the other men with the same sums, those sums being money which the men would lose at gambling on the claim. There is no evidence of any assignment of lien or claim being made in writing, and certainly there is no evidence of it on the record nor in the exhibits that I can find, and the claims were in this manner transferred from the one man to the other back and forward, and the miners in proving up their liens added these sums to their own claims for wages, and in their statement of claim they do not appear to claim as assignees but claim the debt as due to themselves.

The first and most important question to settle is: Is the Act retrospective? The authorities on this point are very clear. Maxwell on Statutes, p. 298, says: "The presumption is that the Legislature does not intend what is unjust, and upon that presumption rests the leaning against giving certain statutes a retrospective operation. They are construed as operating only on cases of facts which come into existence after the statutes were passed unless retrospective effect be clearly intended. It is chiefly where the enactment would prejudicially affect vested rights or the legal character of past transactions or impair contracts that the rule in question prevails. Every statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the legislature, not to have a retrospective operation." It is most unnecessary to reiterate by citation of authority the principle, but some of the cases are very instructive as to their bearing upon this case. The case of Clarkson v. Sterne, 3 A. R. 34, is one in point. The head-note of that case follows: "The defendant, who was employed as [illegible] manager of [illegible] advanced [illegible] a large sum of [illegible] to be repaid [illegible] months' notice [illegible] payment [illegible] a covenant [illegible] certain [illegible] given on [illegible] 1885, [illegible] funds for [illegible] does [illegible]

contractors or workmen only having a remedy for getting at that sum in another and more direct and safer manner. It is suggested (and it can easily be understood) that in the operation of a placer mining claim a layman or contractor with the owner might be wasting his time, deliberately and purposely ruining the owner, who would have no remedy, no power to interfere, and who would see his property destroyed by useless operations carried on by a malicious or careless operator against his interest, and upon that operation workmen might base large claims for non-productive, in fact destructive, work.

If a Miners' Lien Ordinance had been in force at the time this contract was made, the owner might easily have protected himself against such a contingency, but an Act coming into force after the making of the contract renders him helpless if this Act is retrospective and affects that contract and burdens the claim with future operations. Clearly it seems to me that the operation of this Act, if applied to this contract, would be to impose a new obligation or duty upon the owner, and would affect vested rights most materially. I do not think I can hold that to be the intention of the legislature without more precise language than they have used.

In Phillips on Mechanics' Liens—the leading authority which we have upon the operation of the law in the United States—it is laid down at p. 34, that "a claim of lien cannot be maintained for work done under a contract made before the lien law took effect, although the work was done after the law came into effect." There are several dicta of the author which might lead one to a contrary opinion, but I think on a reading of the whole work, so far as it deals with the retrospective or prospective operation of the lien law, one must come to the conclusion that such a law does not affect work done under a contract such as this, even if done after the lien law has come into force.

As to the other questions. First, the credit; from the evidence it seems that after the work was completed the layman gave to the workmen due bills promising to pay on or about 17th October, the anticipated date of the clean-up of the gold. It is not shewn that this was the period of credit given when the contract was made, nor during the operation of the work, but it was an arbitrary date fixed after the work had been closed entirely, and after the men were entitled to their pay; on the contrary, the period of credit

originally intended by the contract with the workmen had expired, and a new period of credit was fixed extending the time. I think this is clearly opposed to the letter and spirit of the Act, and that the real credit expiry period, when the contract was made, is the one from which the filing of the lien should date.

Next, as to the paying of past debts. I do not think that the men who changed the appropriation of payments, and deliberately applied the output of the claim for the year 1906 to pay debts for 1905, were acting bona fide. The time for registering a lien for that year's operations had expired; in fact, no lien could exist for it, because the work was done before the passing of the Lien Ordinance, and it was a deliberate attempt to evade the Act and to obtain an unjust advantage by misapplication of payments. The gold which came out in 1906 was the product of the work of 1906, and should have been applied in payment of the work of that year. I am quite clear it was never intended that the workmen should stand by and see the product of their work dissipated in paying past debts, and then fall back upon the lien against the property; in fact, sub-sec. 3 of sec. 15 seems to anticipate something of that kind where it enacts: "If the minerals or ore produced from such mining claim are not sufficient to satisfy the liens registered against it, the Court or a Judge may direct a sale of the estate and interest charged with the lien." But in this case there was enough gold taken out to satisfy all the claims for that year. Again, as to the transfer of work from one man to another. The Act provides that the right of a lien holder may be assigned by an instrument in writing. There is no instrument in writing. It is perhaps suggested by the evidence that some order was given to the layman to debit one workman with so much and credit another; but we have not got those instruments before us, and we do not know whether they were assigned under the Act or not. The lien is a personal thing belonging to the workman, which he can enforce for his own benefit, or he may properly assign the lien as such to another, who may sue upon it as assignee. We neither have the assignment nor have we a claim made by virtue of an assignment, and so far as these amounts are concerned they should be disallowed. Then, as to the postponing of the date of the coming into force of the Act, it has been held that this indicates the intention of the legislature that the Act

shall be retrospective. That is true in many instances where it can be held that the postponement of the operation of the Act was intended so that any one affected by it should have a chance to protect himself in the interim, and there it is a reasonable conclusion that where that is the apparent intention of the legislature, and that it affects matters upon which parties can protect themselves in the interim between the passing of the Act and its coming into operation, it should be taken to be retrospective in its operation. But where, as in this case, there is no chance for one to protect himself, I do not think that conclusion can be arrived at, and upon this point I would cite the case, already cited, of Moon v. Durden, at p. 498, where it is said: "On referring to the judgment of the three learned Judges by whom that case was decided, it would seem that it was founded mainly on the 10th section, which enacted that the Act should commence and take effect from 1st January, 1829; and from this they inferred that when that day arrived, the Act was in full operation as to all contracts, past as well as future. Parties, they observed, in possession of parol promises, had seven months and upwards, namely, from May, 1828, to January, 1829, during which to bring their actions; and the inference they seem to draw was that there would, therefore, be no injustice in giving to the statute, at the end of that time, a full operation, retrospective as well as prospective; and this, they considered, made the case of Gilmore v. Shuter, to which I shall presently refer, inapplicable as an authority, inasmuch as in that case there was no clause similar to the 10th section in Lord Tenterden's Act. Now, if the meaning of this 10th section be, as the Judges of the Court of Common Pleas, in the earlier part of their judgment, would seem to have supposed, namely, that it was meant to exclude from the operation of the statute all actions brought before 1st January, 1829, then the statute would work no real injustice to any one; a salutary change was to be made in the law, and reasonable time, or what was supposed a reasonable time, was given to all parties affected by the change to protect themselves from any ill consequences in respect of vested rights. But the Court of Common Pleas, in support of their judgment, refer to two nisi prius cases, one before Mr. Baron Pollock, and the other before Lord Tenterden, in which those learned Judges held the statute to apply to the case of actions brought before 1st January, 1829, but in which the

trials did not occur till after that date, on the ground, apparently, that the Judge at nisi prius was to treat the statute as being in force at the time of the trial, and as conclusively binding him with respect to what evidence he was to receive. If this narrow construction is to be put on the statute, it is obvious that the 10th section must, in many cases, be a mere illusory protection, and would very often afford no protection at all." And again: "This we considered as an operation merely prospective, interfering with no vested rights; and in a subsequent case of Moore v. Phillips we held that the statute did not apply to a case where the fiat had issued and assignees had been appointed before the passing of the Act; for this, though the language of the statute might have warranted such a construction, would have been an interference with the vested rights of the assignees, and could not, therefore, be assumed to have been intended by the legislature." And this same question is dealt with in In re Roden and City of Toronto, 25 A. R. at pp. 16 and 17. "The fact seems to have been questioned in the subsequent case, but it does not seem to be of much significance; the parties having the equitable liens could not, in the majority or cases, improve their position, their claims not being capable of registration, and in other cases their claims not being due, they could not seek the aid of the Courts." That is exactly the position which the owners occupy in this case. The contract was a completed contract and in operation when the Ast was passed, and at no time between the passing of the Act and its coming into operation could they have improved their position. They were helpless until something arose which, under the contract, gave them the right to cancel it. They had no such right until the work was entirely performed during 1906. It seems to me there would be a manifest injustice in giving the Act a retrospective operation in this case, and one cannot conclude that the legislature intended to engraft on all contracts previously made the provisions of the Lien Ordinance without the clearest words expressive of their intention so to do.

Upon this view of the case I think the appeal should be allowed with costs.

BRITISH COLUMBIA.

(VICTORIA.)

JULY 17TH, 1907.

FULL COURT.

GABRIELE AND POWER v. JACKSON MINES LIMITED.

Attachment of Debts — Moneys Due to Judgment Debtor under Contract to Mine Ore—Attachment by Judgment Creditors — Mechanics' Liens — Order Directing Issue —Liability of Garnishees to Lien-holders.

Appeal by judgment creditors from order of FORIN, Co. C.J., directing the trial of an issue to determine whether any moneys were owing, accruing due, or payable by garnishees to judgment debtor at the time garnishing orders were served, and if so, what amounts.

Appeal was heard by IRVING, MARTIN, and MORRISON, JJ.

W. A. Macdonald, K.C., for the appellants.

S. S. Taylor, K.C., for the garnishees.

IRVING, J.:—The appellants are a number of tradesmen, who in August or September, 1905, obtained judgment against one Cortiana for goods sold and delivered, etc. In the course of their litigation with Cortiana they served a number of garnishee summonses on the respondent company, with which company Cortiana had made a contract, dated April, 1905, to mine ore for them from their mine. Payment for his services was to be made. Cortiana failed to pay his workmen, and they, on 7th September, 1905, filed mechanics' liens against the respondents' mineral claims. At the end of August, 1905, the company had received under the contract the sum of $202.78 on Cortiana's account. The company also owed him the sum of $29.91 on open account

In September or October, 1905, the respondent company in answer to garnishee summonses filed the following dispute note:—

1. The said garnishees admit that at the time of the service of the garnishee summons herein, there was due and payable to the said defendant under a certain contract made between the said defendant and said garnishees bearing date April, 1905 (and to which contract the garnishees will refer), the sum of $202.78, and there was due on open account at the time of said service between the said defendant and said garnishees the sum of $29.91, making a total of $232.69, which amount, less solicitors' charges, the said garnishees are willing to pay according to the direction and under the protection of the Court, as against any other claim or claims whether under mechanics' liens or otherwise.

2. The said garnishees admit that under the said contract there will accrue due and become payable to the said defendant further sums of money from time to time as the company received payment for ore that may be sold and which has been mined by the said defendant, but, subject to the retention pursuant to the terms of said contract by the said garnishees of 15 per cent. of moneys so received for 3 months after such receipt, and as to the said moneys that may be so received as aforesaid, said garnishees will be ready, when the same becomes due and payable, to pay such moneys over according to the directions of the Court, and under the protection of the Court as to such payment or payments as against any other claim or claims, whether under mechanics' liens or otherwise.

3. The said garnishees repeat paragraphs 1 and 2 hereof, and say that L. Gabriele and 22 other workmen have by summons issued out of this Court on 3rd August, 1905, commenced an action as mechanics' lien claimants against the garnishees herein, to enforce mechanics' liens to the sum of $3,730.40 against the properties of the said garnishees, and which said summons has been duly served upon said garnishees, and the said garnishees, while ready and willing, under the order or direction of the Court, to pay over all sum or sums of money that may be properly due and payable, or that may accrue due and become properly payable to the said defendant under said contract, ask, in such payment or payments, for the protection of the Court as against

the said claims of the said Gabriele et al., mechanics' lien claimants.

4. The said garnishees repeat paragraph 3 hereof, and reserve the right to set up a claim for damages for breach of said contract as against said defendant.

On 5th December, 1905, the plaintiffs applied to the County Court Judge for an order for judgment against the above named garnishees for the amount of the plaintiffs' claim and costs. . . . and for an order that any third party claiming any interest in the moneys due from the said garnishees to the said defendant and attached or sought to be attached in this action do appear and state the nature and particulars of their claim upon the same.

The County Court Judge made the following order:—

That the said garnishees do pay to the registrar of the County Court at Kaslo, B.C., all moneys due or accruing due under the contract between the said garnishees and said judgment debtor, and referred to in the said dispute note, and that such payments be so made to the said registrar when and so often as any moneys shall accrue due and become payable to the said judgment debtor by the said garnishees under the said contract.

It was further ordered that all moneys so paid by the said garnishees to the said registrar should remain in a separate fund, subject to the determination of the issue directed, and subject to further order of the Court.

Under this order $1,676.74 has been paid into Court. On the same day (5th December) the County Court Judge made another order directing that an issue be tried between the workmen and the present appellants to determine whether the workmen had by virtue of their liens any claim on the moneys paid or to be paid into Court under the first mentioned order.

The respondent company were not parties to the second order, and rightly so, as the question to be decided in that issue was wholly collateral to the first order. From this second order an appeal was taken by the lien-holders, and the full Court, being of opinion that under sec. 12 the lien-holders could have no possible right to the moneys, directed (23rd April, 1906), that the judgment on the issue (which issue had been tried in the meanwhile) be entered for the defendants therein, the present appellants. But the full

Court did not determine that the appellants were entitled to the moneys, or what was to be done with the moneys.

This decision left the position of the respondent company untouched. It decided nothing except that the lien-holders could not assert a claim to this money. On 20th January, 1906, the lien-holders got judgment (subject to the liability of the defendant company to more than 6 weeks' wages being established). On 28th January, 1907, the respondent company took out a summons for: (1) Directions as to the disposition of the moneys paid into Court. (2) Determining whether the liens of the said lien-holders attached for more than 6 weeks' wages. (3) And also for determining what, if any, moneys were due from the said Jackson Mines Limited, to each of the said creditors of Cortiana. (4) An order directing such accounts and inquiries as may be deemed necessary.

Before this summons came on to be heard, the appellants, on 5th March, 1907, served notice of motion for an order for payment out of Court to them, the judgment creditors, of the amount of their respective judgments out of the money paid, or to be paid into Court under the first order of 5th December. On 7th March these two applications came on to be heard.

The contention of the respondent company was that until the accounts had been taken between the company and Cortiana, and Cortiana and the lien-holders claiming under him, it would be impossible for any one to say what sum was liable to be attached by the present plaintiffs. This, says the learned counsel for the creditors, amounts to an argument that there was no attachable debt. Perhaps it does, but it is also an argument that the amount of the debt is not yet ascertained, and therefore the time is not ripe to make any order with reference to the disposition of the moneys: Barnett v. Eastman, 67 L. J. Q. B. 517.

As the County Court Judge rightly observed, the order of the full Court was intended to place and did place all parties in the same position as they were on 5th December, after the order for payment in had been pronounced, and before the order for the issue between the lien-holders and creditors was made.

Holding that view, he dismissed the application for payment out by the judgment creditors, and directed that the judgment creditors (present appellants) and the respondent

company should proceed to the trial of an issue to determine whether any moneys were owing, accruing due, or payable by the garnishees to the judgment debtor, Cortiana, at the time the respective garnishing orders were served, and if so, what amounts. From this judgmnt the present appeal is taken.

In my opinion, the judgment should be upheld, because the company cannot be liable to Cortiana or the garnishors claiming under him for any greater sum than the company owes Cortiana. The amount due to Cortiana cannot be ascertained until the amounts of the judgments of the lien-holders have been ascertained. The company, when they have paid these judgments, will have a right to set off the amount thereof against Cortiana. In my opinion, the dispute note is sufficient to satisfy sec. 12 (1903-04).

Counsel cites Randall v. Lithgow, 12 Q. B. D. 525; but the difference between the course followed there by the insurance company and the course adopted by the respondent company is this—the insurance company permitted an order to be made against them. Here the mining company have appeared and stated all the facts which would enable the Judge to determine what order he should make. On these facts he thought fit to make an order directing that the moneys received from the smelter should be paid into Court. The first order of 5th December, in my opinion, should not be regarded as an ultimatum so far as the company was concerned. It was intended for the preservation of the fund until the rights and equities of all parties could be determined. This is abundantly manifest from the last part of the order. I think, therefore, the County Court Judge was right in refusing to pay over to the appellants the money in Court without regard to the state of accounts between the company and Cortiana. Whether he should at that juncture have directed an issue or adjourned the summons until the question of the liability of the company to the lien-holders had been finally settled, is a matter upon which I entertain some doubts, but I think this appeal should be dismissed with costs.

MORRISON, J., concurred.

MARTIN, J., dissented.

BRITISH COLUMBIA.

(VICTORIA.)

JULY 17TH, 1907.

FULL COURT.

MARKS v. MARKS.

Marriage — Proof of—Presumption—Onus — Will — Bequest "to My Wife"—Rival Claimants—Evidence—Depositions Taken on Commission not Read to Trial Judge —Statement by Counsel as to Effect of Evidence — Refusal of Trial Judge to Hear Counsel on the Law—Mistrial—New Trial—Costs.

Appeal by plaintiff from judgment of HUNTER, C.J., finding in favour of the defendant an issue directed to be tried between the plaintiff and defendant, who both claimed the sum of $50 a month bequeathed "to my wife" by the will of A. J. Marks, deceased.

The appeal was heard by IRVING, MARTIN, and MORRISON, JJ.

R. Cassidy, K.C., for plaintiff.

S. S. Taylor, K.C., for defendant.

IRVING, J.:—The defendant went through the marriage ceremony with one A. J. Marks in 1902, at Nelson, B.C., and lived with him from that date until the day of his death on 8th October, 1904.

After probate of his will, dated 6th May, 1904, by which he left "to my wife," without naming her, a sum of $50 per month, had been granted to the executors therein named, the plaintiff came forward and alleged that she was the wife of the deceased testator, having been married to him in Buffalo, N.Y., on 22nd December, 1873.

To establish her case the plaintiff undertook to prove: (1) her marriage with the deceased; (2) that it was not dissolved; (3) that deceased knew that she was alive at the time of the making of the will.

The defendant has the benefit of having in her favour a presumption that the testator would not be guilty of bigamy. She has also in her favour the rule of law which for the security of marriage requires "clear, distinct, and satisfactory" evidence to rebut the presumption of the legality of her marriage.

We have from the testator, by his open marriage with the defendant in 1902, the most positive assertion that a man can make that he was then an unmarried man. We have, in his will (executed 6th May, 1904), a declaration, in effect, that he was the husband of one wife. It is impossible to suppose that he, then in bad health, could have been so cruel as to prepare a document leaving a devise for two persons to struggle for after his decease. His business habits would prevent him doing any such thing.

The case for the plaintiff is that, after a very brief courtship, she left her home in Kincardine to meet the deceased on 22nd December, and that he and she were married the same day in Buffalo, N.Y.

As to this marriage she is the sole witness in this Court. She is unable to produce any records or give with any satisfactory precision the names of the clergyman or of the witnesses. Nor does she shew by independent evidence that no register of marriage was kept, or required to be kept, in Buffalo in the year 1873. She says she was married, but says the janitor of the church told her it was not registered.

In the Dysart Peerage Case, 6 App. Cas. 489, where A. attempted to set up a marriage with Lord Huntingtower, then deceased, who had, subsequent to the marriage with A., gone through the ceremony of marriage with B., which ceremony, being formal and regular in every respect, would be valid, unless Lord Huntingtower was incapable of marrying on the ground that he at the time had a wife then living, Lord Blackburn said (p. 510): "The burthen of proof is on those who in any proceeding assert a marriage; when the proceeding is delayed till after there has been a second marriage, that onus is greatly increased. The man who having a living wife goes through the form of marriage with another woman in England, whether the first marriage was regular or irregular, if it was valid, commits the crime of bigamy, and is liable on conviction to seven years' penal servitude. Those who allege that a man has committed a crime have the onus

of proof cast upon them, for the presumption of law is always in favour of innocence. I think, however, that Lord Huntingtower's general conduct was such as to reduce that presumption in his case to a minimum. But the effect of establishing a prior marriage would also be to reduce the lady, who had bona fide contracted the second marriage, from the position of a legal wife to that of an injured woman, who has innocently committed adultery, and to reduce the children, if any, of the second marriage from the status of legitimate children to that of bastards. Painful as those results would be, they form no reason why the tribunal that has to decide the question should shrink from doing their duty and finding the fact according to the truth, if the evidence is such as to lead them to the conclusion that a valid first marriage existed; but they do, in my opinion, afford very good reason for increasing the onus of proof which lies on those who allege the first marriage, though there is evidence which, if believed, would establish it, unless that evidence is, in the opinion of the tribunal, of such weight as to satisfy that onus. This observation goes rather to the weight of the testimony required as a matter of common sense, than to the law as to what is admissible."

Lord Watson said, at p. 535: "The burden of proving the alleged marriage of 1844 rests, of course, upon the petitioner; but I venture to doubt whether the onus, which is always incumbent on the party alleging an irregular marriage, is increased by the mere fact of the other spouse having subsequently thought fit to contract a regular marriage. If the petitioner, immediately after his marriage with Miss Burke became known to her, had brought a suit against Lord Huntingtower for restitution of conjugal rights, and had, in that action, adduced evidence sufficient, apart from any question of second marriage, to prove her own marriage to Lord Huntingtower, I am disposed to hold that the same evidence would have been sufficient to sustain the validity of that marriage, as in a question with the innocent wife and children of the second. But the second marriage is, in all such cases, an important circumstance, which may, when taken in connection with the conduct of the party challenging it, give rise to a presumption against the reality of the first marriage; and it is a material fact in the present case that these proceedings have been instituted by the petitioner 36 years after the marriage which she seeks to set up, and

29 years after Lord Huntingtower's marriage to Miss Burke. It is obvious that, through the delay which has thus occurred, a great deal of testimony bearing on the alleged marriage of 1844, which would have been available 27 or 28 years ago, has been necessarily lost." Again (p. 535): "In these circumstances, I am of opinion that the status which the wife and children of the regular marriage of 1851 have so long been permitted to enjoy without molestation raises a strong presumption in favour of their legal right to that status, and casts a corresponding onus upon the petitioner. Wherever the evidence leaves room for reasonable doubt, your Lordships ought, in my opinion, to presume in favour of William John Manners, and against the petitioner and her son Albert Edwin."

To these citations I add the following from Lord Watson, shewing that it is not impossible to prove a marriage (p. 538): "I see no reason why the direct and uncontradicted testimony of the person alleging the marriage, if corroborated to some extent by the indirect testimony of others, and supported by the facts and circumstances of the case, should not receive effect. But it will always be necessary, in a case of that kind, to test, very strictly, the statements given in evidence by a woman interested in establishing that she held and holds the honourable status of a wife, and not the degrading position of a mistress."

This case comes before this Court on appeal from the learned Chief Justice, who found in favour of the defendant, on an issue directed to be tried between the parties to ascertain whether the plaintiff (Annie) or the defendant (Susan) was entitled to receive the benefits so devised.

The plaintiff asks for a new trial, on the ground that the issues were not tried out; alternatively for judgment.

Before the trial came on the plaintiff and 3 witnesses had been examined on commission.

On the opening of the trial, counsel for the plaintiff made a statement of the evidence so taken, and then proceeded to call his witnesses.

The defendant's counsel, at the outset, stated that he did not dispute that the plaintiff and A. J. Marks had lived together for a period extending over 3 years.

The plaintiff called one witness, a son of the deceased by a former marriage, whose evidence did not assist the plaintiff in any way.

The Chief Justice, after hearing this evidence, was asked if he would read the depositions to make out the case, to which he replied: "You have told me what they shew." He said, in effect, that they shewed that the plaintiff and A. J. Marks were married by a minister named Hotchkiss, in Buffalo; that she had searched for the witnesses and had been unable to find them; and, that co-habitation and repute was made out; but, notwithstanding this evidence, if the ceremony of marriage with the defendant was proved, the plaintiff must fail.

The defendant then went into the box, and it was established, as I have said before, that she went through the ceremony of marriage with Marks on 19th March, 1902, in Nelson, B.C.; that prior to her marriage with him, viz, in 1895, Marks had informed her that he had been married to a woman, and he was not sure if she was dead; that in letters written to her (defendant) by the deceased, in the month of May, 1904, the same month in which his will was made, he had written to her as "My dear wife" and signed the letters from "Your loving husband, A. J. Marks." These letters are dated the 11th and 15th May, 1904, both written within 10 days after making the will in question.

The Chief Justice gave judgment for the defendant, on the ground, apparently, that the presumption referred to in the Dysart case that a man would not be guilty of bigamy was not displaced, or, in other words, that the plaintiff had failed to prove satisfactorily that the marriage had taken place in Buffalo.

Reference was made to sub-sec. 3 (b) of sec. 307 of the Criminal Code, and it was argued that as Marks could not be convicted of bigamy the presumption relied upon by the Chief Justice did not apply; but the doctrine of presumption of innocence is not limited to criminal law. It extends to every phase of a man's life. We must not assume that he was willing to incur the moral guilt of going through a marriage ceremony with the defendant when he had not made inquiries as to the plaintiff. To escape this moral guilt it would be necessary for him, having regard to the facts that he had deserted her, and that her mother and sisters were still living, to his knowledge, at or in the neighbourhood of Kincardine, to have made inquiries there before marrying the defendant.

The ground of appeal most strongly pressed upon us was that the Chief Justice by not reading the evidence had not really tried the case. With reference to that I propose only to say a few words, because it is not necessary, in view of the opinion I have formed on the facts, to dwell at any length on this particular point. The evidence taken on commission was opened by counsel for the plaintiff, with what degree of fulness I am of course unable to say, but from the remarks make by the Chief Justice it is quite apparent that he fully grasped what that evidence amounted to. It was intended to establish by her own unsupported evidence a prior marriage. and there was corroborative evidence of cohabitation. In my opinion, it is not necessary in every case that all the evidence should be read to or by the Judge. Each case must depend upon its own circumstances, and, as the trial Judge has a wide discretion given him in questions of this kind, in many cases it will be sufficient if it be stated to him. I am not able to state that this discretion was in this case improperly exercised. It was not as if he had dismissed the action on counsel's opening on what he (counsel) expected to give in evidence. Here the Judge had a resumé of the evidence actually given by plaintiff and her witnesses. and after that he proceeded to hear the oral evidence offered on both sides. This distinguishes this case from Fletcher v. London and North Western R. W. Co., [1892] 1 Q. B. 122, where the Judge struck too soon. In appeals before this Court evidence frequently is stated and not read. Even in a criminal case Judges exercise a discretion: see The Queen v. Cooper, 1 Q. B. D. 19, 21, where certain letters were proposed to be put in evidence against the prisoner. The Court admitted the said letters, two were read, and all the others taken as read, and were commented on by counsel. The Court of Crown Cases Reserved found no fault with this practice. Again in The Queen v. Frost, 9 C. & P. 138, an instance will be found where the prisoner having been given in charge, the first count of the indictment was read to the jury at length; at the suggestion of the Judge, Tindall, C.J., the reading of the indictment at length was discontinued. and the substance only of the remaining counts stated.

In Regina v. Bertrand, L. R. 1 C. P. 520, where on a new trial the witnesses were sworn and their evidence on the first trial read over to them, and they were then asked whether what was read was true, this method was disap-

proved of by the Lords of the Privy Council, but they said occasions might arise when the practice there resorted to would be permissible.

Having read the stenographer's notes of the discussion between the Chief Justice and the counsel for the plaintiff, I do not think there was a mistrial. In Robinson v. Rapelje, 4 U. C. R. at p. 293, Robinson, C.J., said with reference to the exercise of discretion of a trial Judge: "Many slight deviations from the general course are sanctioned at trials under the pressure of particular circumstances that arise. Both parties in their turn have need of such latitude occasionally, or the real truth of a transaction would be sometimes shut out from view; such exceptions to the mere course of conducting a trial cannot be made the ground of granting a new trial, unless they have in the particular case led to injustice."

See also Thayer's Preliminary Treatise on the Law of Evidence, p. 530.

Whether all the evidence taken on commission shall be read at length or whether read in part and stated in part or stated by counsel, is, in my opinion, a matter in the discretion of the trial Judge, and for that reason I think the application for a new trial on that ground should be refused.

The next question to determine was, assuming that the practice followed by the Chief Justice was wrong, should we now try the case or send it back for new trial. It was suggested that it would be inconvenient for this Court to try the case, but it seems to me to be our duty to dispose of it in that way if possible, and not to send it back for a new trial: Street v. Dolsen, 14 U. C. R. 438. It will be necessary to refer to the facts in detail.

The plaintiff's story is that in 1873, when a young woman of 21 years, returning from a visit to some friends in Detroit to her home in Kincardine, Ontario, she was detained for an hour or two at the railway station in Windsor, Ontario; that there, in the station, she made the acquaintance of the deceased, who was employed as a painter by the railway company; that they travelled in the train together as far as Stratford; that in those few hours the intimacy had reached such a point that he proposed to marry her; that she went home; that he wrote to her; that she met him on 22nd December, at Brantford, Ontario, by arrangement; that they went from there to Buffalo, where they were mar-

ried in the Tifft House, an hotel in Buffalo, by a Baptist minister, in the presence of the landlord and a lady and gentleman who were brought in as witnesses. The Rev. Dr. Hotchkiss was the name, she thinks, of the minister; the name of the lady and gentleman was Schummel or Schimmel; that after the marriage ceremony a certificate of marriage was signed by herself and Marks and the witnesses and clergyman, and handed to her, and she handed it to Marks, who put it in his pocket; that they stayed there a few days and then returned to Kincardine to her father's house, where Marks was received by the family as her husband; that there was some little talk about the regularity of the marriage, and that in 1874 she produced and shewed this certificate to her friends. Two of these persons now come forward and say that they remember seeing it or hearing it read. They corroborate her story of her being recognized by everybody in Kincardine as Marks's wife; that she and Marks remained in Kincardine (where her father seems to have been a respectable man with some property); they lived together in that town until 1876, when he left her for a short time, that is, until the autumn of 1877, when they again lived together. In the spring of 1878 he left her, going to Manitoba and the North-West Territories, since which time she has not seen him. To continue her story, after her father's death, which occurred in June, 1878, she left Kincardine and went to the State of Michigan, where she resumed her maiden name (Macklen), and in 1886 made the acquaintance of a man named Frankboner. After some time she and Frankboner, without going through a marriage ceremony, lived together as man and wife, and in 1888 she assumed his name and lived with him as his wife until the time of his death in 1897.

Between 1878 and 1897 she made three visits to her mother, who was living at Kincardine; two before and one after she went to live with Frankboner as his wife in 1888.

Now during all this time Marks had been in the West, but had gone back to Kincardine in the year 1892, and had called upon her mother and family, but he did not then see the plaintiff, though it is reasonable to infer that he had heard of her from her people.

She admits that she had no communication with him whatever until 19th November, 1903, when she says she received a letter from him, which she tore up and did not an-

swer. She received a second letter, so she says, dated February, 1904. Then she says that after receipt from him of a third letter written in March, 1904, she sent him a photograph, on the back of which she had written these words: "If you recognize this, send me one in return to me, box 178 Schoolcraft, Mich., Kal. County. Annie Frankboner."

The surname is not very distinctly written.

This photograph was found in his possession after his death. The three letters above mentioned are not produced, but she did produce a letter dated 22nd April, 1904, which is as follows:

Nelson, B.C.,
April 22nd, 1904.

Annie Franklan,
Schoolcraft,
Michigan.

Dear Annie,

Your letter received; was very glad to hear from you; sorry to see you look so bad; you have change very much since I seen you last. I hope you will soon look like your self again soon. I have sent you my photo in return for yours. It is very hard for me to make out your name and if I have spelt rong I think you will shore to get it, any way has my name i on the envelope, you will that I put your address on the photo. I have ad a sick winter first the grippe then the bronchitis then catarrh so you can see that I have ad a time of it. I have ad the very of helth before and as soon has the whether gets warm I will be all O.K. again. I hope so anyway, if though that I should not I would go to California for a month or so, but I hope that I shall not have to go thare as I will be very bisey this summer at one of my mines getting out ore. I hope this letter will find you feeling better, shall be very glad to here from at any time.

Your friend
A. J. Marks.

P.S. Have sent you a paper
A.J.M.

The following letters were also produced:—

Marks to Annie (157) 10th May, 1904, written from Spokane.

Marks to Annie (158) 7th June. 1904, written from Nelson.

It will be convenient to mention here that the date of the will is 6th May, 1904.

To continue the list of letters: Marks to Annie (159) 9th July, 1904; (160) 24th July, 1904; (161) 6th August, 1904; (162) 31st August, 1904. In all of these it is to be observed that he addresses her as "Dear Annie" and signs himself "Yours truly" "Your friend," and in one, the letter dated 6th August, 1904. he uses this expression "You know that when you and I were one I never let pleasure interfere with business."

A. J. Marks died in October, 1904. After his death Annie continued to address letters to him. Two of these are produced, but nothing turns on them; then on 11th January, 1905, Annie addresses the following letter to Susan, the defendant:—

Lorne, Ont.
Bruce Co.

Dear Madam,

I received your letter inform me of Alford deth; it was a sad blow to me. I see by your letter that you are not awar who I am. You say you have my pictur in the sam place in your house. Did A. J. not inform you who I was. I think not I was waten in U.S. for him to meet me thar, I cood not see what keep him until I got your letter. Why did the Burial tak place in Spokane, the home was in Nelson. Now if you want to know why I write this way I will inform you in my next an how long have you been Mrs. Marks? There is a mistery in this that I shall fathum. You ask me what the oldes daughter name was, thay names are all in our family bibel, if it is thare. I shall be pleas to hear from you soon I remain your respectful

Annie J. Marks
Jan. 11 1905.

Address Lorne
Bruce Co. Ont.

P.S.

Do you know the sun's address I have lost trach of him. I wood like his address if you have it I shall be in Nelson some time in the near future. You will hear from me before then.

Yours truly
Annie.

This was followed up by a letter dated February, 1905, in which she states for the first time distinctly what her position is, namely, that she is the wife of A. J. Marks, and that she intends to take proceedings to claim rights, as he has never had any divorce from her.

From her letter of February, 1905, it will be observed that she at the outset puts forward the case that it could only be by proceedings in divorce that her position could be altered. This circumstance is also in her favour. So too is the fact that on a photograph (exhibit N.) Marks has written "Mrs. Marks." Some question was raised at the trial as to whether these words "Mrs. Marks" were indeed written by Marks, but a comparison of the signatures to his letters with the writing in question establishes the point beyond doubt. Observe in all his signatures the curious way he has of writing M. with four downstrokes. This photograph was produced by Alfred E. Marks (a son of the deceased by a former marriage) and having regard to the frayed condition of the edges of exhibit N., or rather that end of it which bore the words "Mrs. Marks," and the witness's volunteered explanation that it had been in his pocket from May to October, I would place no confidence in his testimony whatever, but both parties seem to accept as a fact that Marks had been married to a lady who had died in London, Ontario, in 1871, by whom he had three children.

In a case of this kind it is necessary to test very strictly the evidence of a woman putting forward a claim of this kind.

The difficulty is to find anything by which the truth of her statements as to the marriage can be tested? Her story and that told by her witnesses is consistent with the state of affairs the defendant is willing to admit, viz., that the plaintiff and deceased lived together, but that there was no marriage. It is as to the marriage ceremony that I should like to have some corroboration before I give judgment depriving the defendant of her position as the lawful wife of the testator.

The one who seeks to disturb an apparently existing relation must shew that he or she has clear ground for doing it: instead of being aided by presumptions he (or she) will have all presumptions against him (or her).

In mere questions of property, where there has been a long enjoyment, Courts will protect the possessor by enter-

taining presumptions in support of his right, but in favour of recognizing the tie of marriage these principles are strengthened by other considerations, besides mere respect for the existing state of things. The decision of this Court as to the sufficiency of the proof required to deprive the defendant of her position of wedded life will affect all like cases in which the rights of property alone are not involved. Where the peace and reputation of families, the integrity of the most intimate social relations, are concerned, it is but right to presume that the relation of the parties is in fact what it has always appeared to be, until conviction is forced upon the Court by clear and conclusive evidence.

The absence of independent evidence of some person familiar with the system of celebration and registration of marriages in Buffalo is not without significance. The plaintiff's evidence as to inquiries made in Buffalo is not satisfactory—a vague statement that she saw the janitor at some church adds nothing to the case. The poor woman seems to have undertaken this search unassisted—in my opinion a task quite beyond her. However that may be, the point is that there was no testimony at the trial but her own as to the efforts made to obtain documentary proof of the marriage. Her failure to obtain it establishes nothing. Her whole life after 1878, when Marks deserted her down to 1897, when Frankboner died, and during the correspondence with the deceased down to the year 1905, is subversive of the theory that they were legally married. One must remember the saying of Sir William Earle—a tribunal trying questions of fact, ill performs its duty if it adopts every statement on oath, not contradicted by counter-testimony. Her own conduct outweighs the presumption which would arise from the facts as to which she is able to produce corroboration.

When I read the indorsement on the photograph, "If you recognize this, send me one in return," I found some difficulty in believing the statement made by the plaintiff that before she had sent that photograph to the deceased she had received from him three letters and that she herself had written one to him. The language of the indorsement does not bear that idea out. It rather imports that she had not heard from him nor he from her. It reads more like an offer or attempt on her part to re-open communica-

tions with a person from whom she had not heard for a long time than a continuation of an established correspondence.

Turning to his letter of 22nd April, 1904, the language suggests that there had been a letter from her, either with or separate from the photograph; the expression "your letter received" would be applicable to the communication on the back of the photograph, or there might have been a letter; but the whole language negatives the idea that there had been any correspondence previous to that photograph, or the letter (if any).

If, as she says, he had obtained from her sister (Mrs. Griffith) her address, and had written to her three letters in November, 1903, and February and March, 1904, how is it that he addresses this letter, 22nd April, 1904, to "Annie Fanklan" (that was not her maiden name) and why does he say "it is very hard for me to make out your name" (referring without doubt to the photograph). A look at the indistinct surname on the photograph, will shew at once the name "Franklan" was an imitation of the badly written "Frankboner," and hence it was that he was afraid he had "spelt rong."

Whatever her motive was for inventing these earlier letters I do not know. It may have been that she was anxious to suggest that this correspondence had been opened by him and not by her, or that it had been going on for some time before the will was made, and so lay a more certain foundation for the argument that she was the person referred to in the will as "my wife;" or it may have been for some other reason. But, whatever it was, I cannot accept her story on this point.

Having come to that conclusion on that point, what weight can I give to her other testimony? Can it be said that she has established the fact of her marriage with "clear, distinct, and satisfactory evidence?"

But, assuming that she was regularly married in Buffalo, and that Marks in 1892 had been misinformed as to her marriage with Frankboner, in my opinion she is not the person referred to as "my wife."

If Marks was under the impression that the plaintiff had been divorced from him, he would not use the word "wife" when referring to her. If he was indeed advised of the true condition of affairs, then the question who was de-

signated is best answered by the language he himself uses in his correspondence with the plaintiff and defendant respectively.

In May, 1904, the month in which the will was prepared, he wrote to the plaintiff as "Dear Annie" and subscribed himself as "Your friend"—to the defendant he wrote as "My dear wife" and subscribed himself "Your loving husband."

There is one other point I want to refer to. Mr. Taylor suggests that if we are of the opinion that the evidence is sufficient to establish the plaintiff's case as against the defendant, we should now permit him to go back for a new trial in order that he might give in evidence the testimony of Mr. Crease, who prepared the will. I do not think we should do so, as the point was not pressed by counsel: Whitehouse v. Hemmant, 27 L. J. Ex. 295.

MORRISON, J.:—The main ground of appeal herein is that there was a mistrial because the learned Judge dispensed with the reading in extenso of the evidence of the plaintiff taken on commission. From the transcript of the proceedings at the trial and from what was stated before us by counsel, I am of opinion that the trial Judge properly exercised his discretion in obviating the necessity for hearing read that evidence.

I would dismiss the appeal.

MARTIN, J.:—A preliminary question and a serious one was raised by appellant's counsel, before going into the various points of fact and law which were argued before us. He contended (to quote almost his exact words), that "the case had not been tried," because the plaintiff's counsel at the trial was not allowed to present his case, and "ex debito justitiæ, it should be tried."

This contention is founded on paragraph 6 (d) of the notice of appeal, wherein the ground of complaint is set out as follows :

(d). In refusing to listen to argument on behalf of the plaintiff or to allow her counsel to cite any authorities in support of her contentions.

In support of this position we were referred to pp. 131, 132, 136-155, of the appeal book, wherein that portion of the proceedings referrable to this complaint is set out.

It appears that after the plaintiff's case had been closed and one witness had been examined for the defence, the defendant's counsel proposed to call another, when, after some discussion, the learned Chief Justice said to him:—

THE COURT: I do not think you need go on. I see nothing to displace the presumption afforded by the marriage certificate, and this man did not commit bigamy in marrying this woman.

Upon which the plaintiff's counsel sought before judgment was announced to address an argument to the Court in arrest of it, and the following discussion took place:—

MR. HANNINGTON: I would like to argue—

THE COURT: There is no need to argue further.

MR. HANNINGTON: On a question of law.

THE COURT: There is no question of law.

MR. HANNINGTON: I have a large number of authorities which I submit are exactly contrary to your Lordship's ruling.

THE COURT: You had better reserve them for the appeal Court.

MR. HANNINGTON: Does Your Lordship refuse to hear me?

THE COURT: I have come to the conclusion that there is nothing to displace the violent presumption that this man did not commit bigamy in marrying this woman in 1902.

After a discussion on costs, judgment was formally pronounced and later entered for the defendant.

The learned trial Judge was, with all due respect, clearly mistaken in saying there was no question of law to argue. We have listened for many hours to the discussion of several of such questions arising out of facts before him.

In my opinion, the contention of the appellant that at the trial her counsel was not allowed to properly present her case is established by the above extracts from the proceedings. Counsel has a right of audience to a reasonable ex-

tent (according to circumstances), on the law as well as on the facts, and to deprive him of either of them is at once contrary to natural justice, and the universal practice of the Courts of this country. To refuse a litigant that right is to deny him that fair trial which is his, ex debito justitae, as counsel put it.

It is the duty of the trial Judge to listen to argument on all relevant points, to consider it, and to give a judgment thereon. That duty is not discharged by forcing a litigant to go to the Court of Appeal, and there, after much expense and delay, have the first opportunity of presenting an argument which ought, in the first place, to have been entertained and passed upon by the trial Judge. The plaintiff's counsel had the same right of audience at the trial as on appeal, and why he was refused that right which he claimed to the full extent necessary consistent with respect for the Court, is unexplained. The position is a trying and delicate one for counsel to be placed in when the Judge takes a very strong view, as here.

Such being my view, it is unnecessary to consider the further point of a somewhat similar nature (notice of appeal 6c), which the appellant's counsel urged at length (and supported by said references, particularly p. 137):

6. (c) In refusing to hear or consider the evidence of the plaintiff and her witnesses taken under commission, and tendered by the plaintiff, in proof of her marriage to the said deceased (although such evidence was not objected to by the defendant).

And it is likewise unnecessary to consider the further questions that arose upon the evidence, for to do complete justice between these litigants, there should be a trial de novo of the whole case. Indeed, the truth is, as counsel concisely put it, that there has so far been no trial in the legal sense of that term.

As to the costs of this appeal, they must follow the event, as there is no valid reason to deprive the appellant of them. It is true that it was not at the instance of the respondent that the learned Judge adopted the course complained of, nor did the respondent endeavour to support or justify that course before us. It was the act of the Court alone done ex mero motu, and at first blush it might be thought that the respondent could disclaim it, and escape the unfortunate consequences. But that is not the law, as appears by the

unanimous decision of the Ontario Court of Appeal in Mills v. Hamilton Street R. W. Co., 17 P. R. 74, wherein the trial Judge ex mero motu refused to hear additional evidence in support of the defence, on the ground (erroneous as it turned out), that he had heard sufficient on which to warrant his nonsuiting the plaintiff. On appeal the nonsuit was set aside, whereupon the respondents (defendants) urged that they should be absolved from costs "because the learned Judge had, as it were, taken the matter into his own hands at the trial, and nonsuited the plaintiff against the wish of the defendants, who desired to give all their evidence and complete the case." But the Court was unanimously of the opinion "that nothing has been shewn by the respondents which should induce us to depart from the general rule that the successful appellant should have his costs of the appeal." It is true that the case is one from a County Court; but the judgment goes on to shew that such practice is "applicable to all appeals since the introductions of the Judicature Act," and the matter is now governed in this Court by Rule 976 of the Supreme Court Rules, 1906.

A further direction was made in that case regarding the payment of the costs below by the respondents, but that apparently is based upon some Ontario practice respecting appeals from the County Court, and is not in accord with the usual order made by this Court in directing a new trial, which is that the costs of the former one shall abide the result of the new, which order should be made, I think, in this case.

There are certain remarks in the same case regarding a new trial not being necessary where all the evidence is before the Court of Appeal, which are in accord with our general practice, but they do not apply to the present case (which is based upon a deeper and graver principle), for in the Ontario case the learned Judge went wrong in thinking he had enough evidence to nonsuit on, and therefore erroneously refused to hear further evidence; but he at least applied his mind to what was before him and did not refuse to hear counsel. In the case at bar, however, the learned Judge went much further and entirely refused to listen to counsel on the law—thus denying him his complete right of audience, without which there can be no legal trial, and thereby infringing that fundamental principle of justice in regard to which it was observed in Ex p. Evans, 9 Q. B. 281, "In

the superior Courts by ancient usage persons of a particular class are allowed to practise as advocates, and they could not lawfully be prevented." The plaintiff's counsel herein was "prevented" from fully presenting his client's case, and that was a curtailment of his right to practise to the full extent allowed by law which (with all due respect) cannot, in my opinion, be justified.

The appeal should be allowed with costs as above stated.

BRITISH COLUMBIA.

(VICTORIA.)

IRVING, J. JULY 19TH, 1907.

TRIAL.

DUDGEON v. DUDGEON AND PARSONS.

Husband and Wife—Moneys Advanced by Husband to Enable Wife to Purchase Land — Resulting Trust — Evidence to Establish — Sale of Land by Wife—Notice by Husband to Purchase — Payment to Wife after Notice —Recovery of Husband of Amount Paid — Lien of Wife for Moneys of her own Used in Purchasing Property — Reference.

Action for a declaration of trust and to recover from defendant Parsons $1,750, in the circumstances appearing in the judgment.

H. D. Helmcken, K.C., and F. Peters, K.C., for plaintiff.

A. E. McPhillips, K.C., for defendant Dudgeon.

Wootton, for defendant Parsons.

IRVING, J.:—The plaintiff is the husband of the defendant Dudgeon.

The plaintiff alleges that on 21st November, 1889, the defendant Mrs. Dudgeon, with money supplied to her by him, obtained from the trustees of the Work estate a conveyance of a piece of property, and that afterwards on 5th December, 1906, she sold it to the other defendant, Parsons.

The plaintiff's case against Mrs. Dudgeon is that she was a trustee for him by reason of the fact that he had advanced the purchase money.

His case against Parsons is that he (Parsons), having notice of this trust before he had completed the contract by payment, should have refrained from paying the balance of the consideration money, $1,750, to Mrs. Dudgeon until the question of trust or no trust was settled.

The first question to be determined is whether there was a resulting trust in favour of the plaintiff.

The leading case on resulting trusts, Dyar v. Dyer, 2 Cox 92, decided in the Exchequer Court, stated the clear result of all the cases to be that the trust of a legal estate taken in the name of any person results to the man who advances the purchase money, but, as this resulting trust arises from an equitable presumption, it may be rebutted by parol evidence shewing that it was the intention at the time of the purchase of the person who advances the purchase money that the person to whom the property is conveyed should take for his or her own benefit. The person who pays the money cannot alter such intention at a subsequent period. A purchase by a father in the name of his child, or by a husband in the name of his wife, is a circumstance of evidence which displaces the equitable presumption of a resulting trust. The fact that this relationship exists is indicative of an intention on the part of the husband or father to benefit the wife or child, but this circumstance of evidence may, in turn, be met with other evidence tending to shew a contrary intention.

In the present case the husband gave evidence to the effect that the advance was not intended for the benefit of the wife.

But before proceeding to examine his evidence, I would draw attention to some Canadian decisions. In 1873 the Court of Appeal in Ontario had before it for consideration the case of Owen v. Kennedy, 20 Gr. 163. The case was heard before Chancellor Spragge, who said: "The plaintiff's position is, that there was a resulting trust in favour of Burwell. The conveyance was to a wife, and the presumption is that it was by way of advancement, but this presumption may be rebutted by parol by a declaration made by the settlor before or at the time of the conveyance." The Chancellor found in favour of the plaintiff, as it was shewn to his

satisfaction that the conveyance was not intended by way of advancement to the wife simply, but as a provision to the husband and wife for life with remainder to the children of the settlor.

From this decision an appeal was taken. On that appeal the Chancellor sat, with Draper, C.J., Hagarty, C.J., Morrison, J., Mowat, V.-C., Galt, J., Gwynne, J., and Strong, V.-C. On the appeal the appellants shifted their ground. Chancellor Spragge, after referring to the trial, said: "I held the plaintiff entitled to rebut the presumption that the conveyance to the wife was intended by way of advancement to her, by parol. I believe the correctness of this is not questioned. The question now made is, that what the evidence establishes is, not that the purchase moneys were provided by Burwell, by reason of which a resulting trust would arise in his favour; but that the purchase moneys were provided in part by Burwell, in part by his wife, and in part by his daughter."

The appeal was dismissed (Gwynne, J., dissenting). Strong, V.-C., said: "The land having thus been bought with the money of Lewis Burwell, and the conveyance having been made to his wife, there would, in the absence of proof to the contrary, be a presumption arising from the relationship of husband and wife, sufficient to counteract the trust which ordinarily results when property is purchased and paid for with the money of a person other than that one to whom the conveyance is made. It is, however, open to the plaintiff, claiming under Lewis Burwell, to rebut the presumption of advancement by parol proof that such was not the intention of the purchaser at the time the conveyance was made; and I am of opinion that the evidence shews very clearly that the intention to advance did not exist."

In 1873 Spragge, C., heard the case of Wilde v. Wilde, 20 Gr. 521. The action was brought by the father against his two sons. The case made by the father on the pleadings was that the father was to be the purchaser of the premises; that, when paid for, the land was to be the property of the defendants (the sons); but the plaintiff, the father, was to have the control of the property for his life, and he and his wife and family were to live on and be maintained out of the property. (The son John took a conveyance of the premises for the father and mother for life, to be divided between himself and his brother William upon the death of

the parents.) At the trial the son did not deny that the father and mother were entitled to a home on the premises so long as they lived, but he claimed that he was the purchaser for himself. The Chancellor gave judgment for the plaintiff, but on the case coming on to be heard before himself sitting with his two Vice-Chancellors he was reversed. The view taken by the Vice-Chancellors was that an express trust in favour of the plaintiff and the son John had been made out, but on account of the 7th section of the Statute of Frauds such express trust could not be judicially recognized. In their opinion, the plaintiff was seeking to establish as a resulting trust a trust of a different and more onerous character. They were of opinion that the plaintiff could not be permitted, in the face of his own evidence of an actual trust, to fall back upon a legal implication of a trust of a totally different nature. Strong, V.-C., puts it this way: "Therefore I consider the law to be, that a man who seeks to enforce an express parol trust, which out of his own mouth and by his own oath he proves to have been the declared intention of the parties, can never insist upon enforcing a trust by operation of law." He, however, assumed, for the purposes of his judgment, that this case of resulting trust was open to the plaintiff. Dealing with the case on that footing, he found that the father and the son John had worked the place together for some years on shares; that at the time of the purchase in November, 1870, they held it under a lease; that John was the person who signed the preliminary contract: that of the $1,000, the first payment on account, $564, was paid by John; $300 by the father, and $136 came from a purse held by the mother, to which both parties contributed; that the agreement was with John, who gave the mortgage to secure the balance of $2,000. In fact, nearly two-thirds of the money paid was John's money or raised upon his credit, and the balance had been contributed by the father. He then proceeds: "Taking this, however, to be the proper view of the evidence, it does not establish any right by way of resulting trust in the plaintiff. There can of course be no doubt but that a trust results where two or more persons, in determined proportions, advance the purchase money of land which is conveyed to one, as was decided in Wray v. Steele. Where, however, it is impossible to determine the proportions in which there has been contribution to price, as here, it is impossible that there can be

any trust by operation of law, for the Court cannot determine the interest. Upon this, authority, if any is needed, is clear. I refer to Crop v. Norton, decided by Lord Hardwicke, a case which seems to be exactly in point, and has never been overruled, and to Re Ryan, in which Crop v. Norton was expressly followed. At all events, the inevitable inference that the defendant John Edward Wilde was beneficially interested in the money in his mother's hands, coupled with the other circumstances of his own large advance, independently of his father and the family altogether, and his coming under the liability of the mortgage covenants, would, to revert to the first point I observed upon as arising on the evidence, be conclusive to my mind as shewing that he was a beneficial purchaser, and not a trustee either actually or by legal implication."

Blake, V.-C., was of opinion that "there may have been money advanced by the father and mother to John, but if so, it was an advance to him by them, in respect of which John may be their debtor, but this money, when it went into the hands of the vendor, was received as the purchase money of him whose it then was, and was to and did become, according to the statement and agreement of all parties, the purchase of the premises."

This action seems to me to resemble in a great many points the case I have under consideration, and had not these eminent Judges disagreed, the authority of Wilde v. Wilde, whichever way it was decided, would have been of very great weight. But they differed in two respects. As to the law of resulting trusts, Strong, V.-C., was of opinion that "where, however, it is impossible to determine the proportions in which there has been contribution to price, as here, it is impossible that there can be any trust by operation of law, for the Court cannot determine the interest." Spragge, C., admitted that the authorities cited by Strong tended to shew that in such case there would be no resulting trust in favour of the father, but he thought that it might be ascertained by inquiry in the Master's office, but he added: "If it is intended to carry the doctrine to this extent, that where land is purchased with moneys, a portion of which only belongs to the party who takes a conveyance to himself, and the residue to another person, there is no resulting trust in favour of that other person, I am not prepared to assent to it." Again on the facts of the case, Spragge, C.,

thought that what has been advanced by the father, and what has been furnished from the profits of the farm, were in no sense advances to John, to enable him to buy the farm, but were moneys of the father furnished by him as part of the purchase money on his own behalf, as purchaser on his own behalf or at least joint purchaser with John of the farm." Strong and Blake, V.-CC., throught that a large portion, if not the bulk of the purchase money, was found by John himself.

Then in 1886 the Court of Appeal of Ontario had before them the case of Sanderson v. McKerchar, 13 A. R. 561, on appeal from Armour, J., who had given judgment in favour of the defendant. The majority of the Judges, Burton, Patterson, and Osler, JJ.A., came to the conclusion that the judgment was wrong and reversed it. Hagarty, C.J.O., thought it was right, and in the course of his judgment cited with approval the remark of Strong, V.-C., in Wilde v. Wilde, that where it is impossible to determine the proportions in which there has been contribution to price, as here, it is impossible there can be any trust by operation of law, for the Court cannot determine the interest. That case was taken to the Supreme Court of Canada, where the judgment of Armour, C.J., was restored; Ritchie, C.J., and Taschereau, J., say for the reasons given by Hagarty, C.J., although they did not refer particularly to the remark in question. Strong, J., said: "The law is clear that in order to raise a resulting trust the party asserting it must be able to shew that at the time of the completion of the purchase he either actually paid, or came under an absolute obligation to pay, the whole or some ascertained proportion of the price."

In the present case the plaintiff says that in 1889 there were some 4 or 5 children, the result of his marriage; that he had then been for some time in receipt of good wages, $75 per month; that he saw Mr. Haynes, of Heisterman & Haynes, the agent for the Work estate, and made the arrangement with him for the purchase of this piece of property, then wild land, at $6 per acre; $200 or $250 was to be paid in cash, balance on time; that during all this time he had been handing to his wife his wages; that he himself was engaged from early in the morning till late at night, and for that reason he handed his money to his wife, with which she was to pay bills and manage affairs generally; that he paid to her the whole of the $600 which she used in purchasing this

property. He paid to her the first instalment: to make up the full amount he had to borrow $50; that she attended to the remaining payments. These were paid out of the money he handed to her; and she obtained the deed from Haynes in her own name; that he saw the deed when she first got it; that he did not read it, but was quite satisfied when she had it; that they put up a small house, which he paid for; and later on a larger house was put up. He continued to supply money from time to time until it became necessary to raise some $800 on mortgage, when, of course, the property being in her name, she executed the mortgage.

Now, her story is, that all the moneys given to her by him were a gift to her, and that she used this money so given to her, and some other moneys of her own received from her father and from other sources, and bought the land for herself. I cannot believe that it was ever intended that this property when purchased should become the absolute property of the wife, or that she should be in a position to sell it without regard to his wishes in any way. I believe that it was intended it should be held by her as a home for him and his family. Her story goes too far, and I am unable to accept it.

The result is that I accept the statement made by the plaintiff. That some of her money may have been put in that $600 is not at all unlikely, but her evidence is so unreliable that I cannot accept it.

I am speaking now of the original $600. Later on she borrowed money on mortgage, pledging this property and her own credit, and the money she obtained was used in building a house on the property. What was done afterwards by them would not affect his right to the real estate, although she may be entitled to a lien for all moneys advanced by her.

I come to the conclusion, therefore, that the money with which this property was purchased was the plaintiff's money, purchased for his own benefit, and a resulting trust arises in his favour. An inquiry can be held before the registrar as to the money advanced by her.

That being so, we now come to the case against Parsons. It appears that in the end of November, Parsons agreed to purchase the property for $3,500, half down, and the balance in one year, with interest. He paid $1,750, and came to the premises on the evening of the 4th . . . to take posses-

sion. As he was moving in, the plaintiff came home, and then for the first time learned what was being done. Some trouble ensued. He informed the defendant Parsons with more or less distinctness that the property belonged to him, and he would not allow Parsons to take possession. On the morning of the 5th he caused a letter to be written to Parsons notifying him of his (plaintiff's) claim. This letter was delivered by the office boy of Messrs Lee & Fraser, who were carrying through the transaction, but did not actually reach the defendant Parsons's hands until after he had paid over the balance, $1,750, and obtained from Mrs. Dudgeon a conveyance of the land. The arrangement between Parsons and Mrs. Dudgeon, by which he took an immediate conveyance, was intended by them to forestall any action of the plaintiff, and under these circumstances I think the plaintiff has a right to recover from Parsons the $1,750, but, as the question of Mrs. Dudgeon's lien has to be considered, it must be paid into Court.

Costs of action up to payment of $1,750 to be recovered by plaintiff against Parsons and Mrs. Dudgeon. Subsequent costs and further directions reserved.

NORTH-WEST PROVINCES.

(WESTERN ASSINIBOIA.)

NEWLANDS, J. MAY 18TH, 1907.

CHAMBERS.

CYR v. O'FLYNN.

Discovery — Examination of Party — Conduct Money—Insufficient Payment — Acceptance without Objection — Failure to Attend—Costs.

Summons to strike out defence of defendant La Chance for not appearing on examination for discovery.

Bigelow, for plaintiff.

Cross, for defendant La Chance.

NEWLANDS, J.:—Rule 204 of the Judicature Act provides that the party shall attend for examination on being served with a copy of the appointment and a subpœna, and upon payment of the proper fee. These fees are as follows: Actual railway fare, and for every day necessarily absent from residence, in going to, staying at, and returning from examination (when over two miles), $2. The defendant in his affidavit swears that the railway fare going and returning is $9.35, that it takes one day to go and one to return, and that he would have to remain one day at Regina for the examination—in all three days. The proper fees payable to the defendant would, therefore, be $15.35. He was only paid the sum of $12.55.

It, however, appears by the affidavits that he accepted this sum, and did not object that it was insufficient, and, as there is no evidence that he returned the same to plaintiff, or the person serving him, I presume that he still has it. He should therefore have attended for examination: Goff v. Mills, 13 L. J. Q. B. 227; Dixon v. Lee, 1 C. M. & R. 645. He would in that case have been entitled to receive the balance of his fees before being examined. The plaintiff will be required to pay him the sum of $2.80, and thereupon he will be required to attend for examination.

As both parties are in fault, there will be no costs.

NORTH-WEST PROVINCES.

(EASTERN ASSINIBOIA.)

WETMORE, J. MAY 18TH, 1907.

CHAMBERS.

MOOSE MOUNTAIN LUMBER AND HARDWARE CO. v. ANDERSON.

Summary Judgment — Ex Parte Proceeding — Proof of Plaintiffs' Case.

Application by plaintiffs for summary judgment.

W. A. Nisbet, Moosomin, for plaintiffs.

WETMORE, J.:—This is an application for judgment. An order was obtained under Rule 22 of the Judicature Ordinance, and the order required that judgment should not be signed until a Judge was satisfied, by such proof as he might require, of the justice of the claim. This action is brought upon a lien note made by the defendant in favour of Thompson & Hay, and by Thompson & Hay indorsed to the plaintiffs; also for an amount of an account ordered for goods sold and delivered and interest thereon. The summons has been served as directed by the order, and the time has elapsed upon which the plaintiffs could apply for judgment. The only affidavit verifying the claim is that of the plaintiffs' advocate. He swears that he has a personal knowledge of the facts deposed to, and that the plaintiffs in the action seek to recover the principal and interest under the lien note, which lien note was given by the defendant to the plaintiffs as payment for 4 horses sold and delivered by the plaintiffs to the defendant. Why the note should have been made in favour of Thompson & Hay, under such circumstrances, I do not understand. There is nothing in this affidavit to verify the claim for goods sold and delivered. It does not verify the cause of action to my satisfaction at all. In the first place, I fail to understand how the plaintiffs' advocate, as such, can have any personal knowledge of what the lien note was given for. I think the advocate really intends to verify what the action purports to be brought for, not to verify the cause of action.

What I will require is: first, the production of the note; second, proof that it was signed by the defendant; third, that it was indorsed by the payees.

As to the claim for goods sold and delivered, I want some person who has knowledge of the sale to prove the sale of the goods, and then I want something to establish the claim for interest with respect to this bill.

This procedure is very drastic, and it evidently contemplates a judgment being obtained behind a man's back, who has no knowledge of the proceeding, and under such circumstances I must insist upon being satisfied by affidavits of the persons who really know the transaction and who can prove the cause of action as laid.

NORTH-WEST PROVINCES.

(EASTERN ASSINIBOIA.)

WETMORE, J. MAY 25TH, 1907.

CHAMBERS.

FRASER & CO. v. DOWAD.

Security for Costs — Application for—Necessity for Stating that Appearance Entered—Inspection by Judge of Court Records.

Application by defendant for security for costs.

W. A. Nisbet, Moosomin, for defendant.

T. D. Brown, Moosomin, for plaintiffs.

WETMORE, J.:—This is an application by the defendant for security for costs. The affidavit on which it is founded does not state that the defendant has appeared. The objection is raised that such affidavit is defective in this respect, and that the application must be refused. In 1 Arch. Q. B. Pr., 14th ed., p. 400, it is stated that the application cannot be made until after the defendant has appeared, and De La Preuve v. Biron, 4 T. R. 697, is cited for that proposition. In Hall v. Brigland, 2 P. R. 464, the Master expressed the opinion that the state of the cause ought to be shewn by the affidavit, but, as I understand the report, he did not express a decided opinion on the question, but, inasmuch as Craven v. Smith, L. R. 4 Ex. 146, decided that the Court might look at its own records, and knowing from the papers filed and produced to him the state of the cause, he held he was possessed of information as to the state of the cause. Following the course adopted by the learned Master, I have searched the files and find that an appearance was entered with the clerk. I wish it understood that the matter of searching or inspecting the files is entirely discretionary with the Court or Judge, and I have been led to that course in this instance because the point has never been raised before, and it has been quite common in applications for security for costs not to set forth in the affidavit that appear-

ance has been entered. I am also, I may say, inclined to the opinion that the application cannot be made until after appearance. As the plaintiff applied to cross-examine the defendant on his affidavit, I will make that order.

NORTH-WEST PROVINCES.

(EASTERN ASSINIBOIA.)

WETMORE, J. MAY 25TH, 1907.

CHAMBERS.

BELL ENGINE AND THRESHER CO. v. BRUCE.

Appearance — Necessity for Notice of — Rules of Court — English Practice—Security for Costs.

Application by defendant for security for costs.

E. L. Elwood, Moosomin, for defendant.

T. D. Brown, Moosomin, for plaintiffs.

WETMORE, J.:—This was an application for security for costs. The defendant entered an appearance with the clerk, but he did not serve any notice upon the plaintiffs or their advocate. Objection was taken that application for security could not be made until after appearance, and that, in order to constitute a proper appearance, it was sufficient to enter an appearance with the clerk, but notice of appearance must be served on the plaintiffs' advocate. In Fraser & Co. v. Powad, decided by me to-day (ante), I expressed the opinion that it was necessary to enter an appearance before making the application. The question now is whether an appearance was entered in this case. Rule 80 of the Judicature Ordinance provides as follows: "Within the time limited for appearance by the writ of summons, or afterwards, before the plaintiff has taken any further step in the cause, if the defendant, or, if there be more than one defendant in the action, a defendant, desires to contest the plaintiff's claim and defend the action, he shall by himself or his advocate

enter an appearance in the office of the clerk whence the writ of summons issued." That is the only provision in the Ordinance respecting the entering of appearance which affects the question under discussion. The English practice respecting the entering of appearance is governed by Order XII. of the English Rules of Court. Rules 8 and 9 of that Order contain all the provisions necessary for discussion in deciding the question now before me. It will be observed that the Ordinance contains no provision for service of notice of appearance. Section 21 of the Judicature Ordinance provides that "subject to the provisions of the Ordinance and the Rules of Court, the practice and procedure existing in the Supreme Court of Judicature in England on the first day of January, 1898, shall, as nearly as possible, be followed in all causes, matters, and proceedings." The question, therefore, is, whether, under that section, Rule 9 of Order XII. is (in so far as it is applicable) applicable to the practice here. I find it sometimes extremely difficult to decide whether a rule of practice which is in force in England is applicable here by virtue of the section of the Ordinance which I have cited. The Ordinance very frequently passes over a section which would appear to be quite applicable, and there seems to be no reason why it was not included in the Ordinance. In these cases it is perhaps not difficult as a rule to reach a conclusion. In a case like the present however it is more difficult. The framers of the Ordinance in providing for the entering of appearance have somewhat departed from the language of the English Rule 8. It will be observed that by the English Rule "a defendant should enter his appearance to a writ of summons by delivering to the proper officer a memorandum in writing," and then it specifies when it is to be dated and what it shall contain. Rule 80 of the Ordinance provides that "if the defendant desires to contest the plaintiff's claim and defend the action, he shall by himself or his advocate enter an appearance in the office of the clerk." These provisions in the Ordinance with respect to appearance appear in the first Judicature Ordinance, of 1886, secs. 52 and 53, and what is equivalent to Rule 10 of the English Rules is contained in sec. 53 of the last mentioned Ordinance and Rule 81 of the present Judicature Ordinance. That is, the framers of all the Judicature Ordinances existing in this country, while they have provided for the entering of appearance with the clerk, have left out the section providing for notice, which is the fol-

lowing section, but retained the provisions of the next following section of the English Rules. And for the reasons stated it is somewhat difficult to arrive at just what they intended. This I am satisfied of, that whatever was intended by the Ordinance of 1886 must be held as the intention under the present Judicature Ordinance. In view of the manner in which Rule 9 of the English Rules is framed, and the state of this country as it was in 1886, I have come to the conclusion that it was the intention not to embody the provisions in the Rules for giving notice of appearance in our practice. Rule 8 provides for a duplicate memorandum being delivered to the officer, and for that memorandum being sealed and returned to the party entering the appearance, and Rule 9 provides that the notice of appearance, no matter how it is served or delivered, is to be accompanied with this sealed duplicate memorandum. It seems to me that it was not intended to incorporate these provisions into the practice in this country, and I do not see my way clear to say that one part of Rule 9 shall apply and the other shall not. I have, therefore, come to the conclusion that it is not necessary to serve a notice of appearance on the opposite party. If the plaintiff attends at the clerk's office to sign judgment for default of appearance, he will, find, if the defendant has appeared, the appearance entered, and that will prevent his entering judgment. Consequently the appearance was properly entered in this case.

Massey-Harris Co. v. Hutchings, which was decided by me and was reported in 3 W. L. R. 252, was cited in support of the plaintiffs' contention. That case, however, is not applicable at all. I did not in that case hold that it was necessary to give notice of appearance. I merely contrasted the language of the English Rules with respect to filing and service of appearance with the language of the Territorial Ordinance as to filing and delivering a defence, and held that, as they were similar, and as no defence had been filed, there was none delivered.

The defendant has applied to examine one T. P. Bell, upon his affidavit, and that application will be granted.

NORTH-WEST PROVINCES.

(CALGARY.)

STUART, J. MAY 25TH, 1907.

CHAMBERS.

RE RIDDOCK AND CHADWICK'S CONTRACT.

Land Titles Act — Caveat — Summary Application to Set aside — Practice and Procedure — Trial of Issue — Vendor and Purchaser—Default in Payment of Instalment under Contract for Sale of Land — Rescission of Contract.

Application by Charles Riddock, under sec. 91 of the Land Titles Act, to set aside a caveat filed by John N. Chadwick against lots 13 and 14 in block 72, plan A, Calgary.

C. B. Reilly, for Riddock.

W. J. Millican, for Chadwick and Illingworth.

STUART, J.:—The applicant, Charles Riddock, is the owner of an interest in the lots in question under an agreement by him to purchase the same from one D. B. Niblock, who in turn is the owner of an interest in the lots under an agreement to purchase the same from one Clifford T. Jones, the registered owner. On 20th December, 1906, the applicant Riddock entered into an agreement to sell the lots to the caveator Chadwick and one Illingworth for $7,600, of which $1,000 was paid in cash, $2,000 was to be paid on 20th January, 1907, $2,300 on 20th March, 1907, and $2,300 on 20th July, 1907. The purchasers defaulted on the payment of 20th March, and in consequence a new agreement was entered into on 25th March, which was substituted entirely for the agreement of 20th December. By the substituted agreement the sum of $3,500 was expressed to have been paid in cash, $1,800 was to be paid on 25th April, and $2,300 on 25th July. The purchasers again made default in the payment of 25th April, and on the 26th Riddock's advocates, Messrs. Reilly and McLean, wrote a letter to Chadwick and Illingworth wherein they stated that they were in-

structed to notify them (Chadwick and Illingworth) that unless the overdue instalment and interest were paid on or before the 30th instant Mr. Riddock would avail himself of his right of repossession according to the terms of the contract. On 30th April the purchasers, instead of making the payment, filed the caveat in question. The vendor Riddock then took out this originating summons under the provisions of sec. 91 calling upon the purchaser to shew cause why the caveat should not be set aside. The summons was issued upon an affidavit by Riddock setting forth the facts above stated, making the agreements of sale from Niblock to Riddock and the two agreements of sale from Riddock to the caveators, and the letter from Messrs. Reilly and McLean, exhibits, and stating that Riddock had demanded payment from the purchasers of the sum of $1,800, and that they had replied that they were unable to make the payment, and would not do so. The affidavit also stated that Riddock was negotiating for a resale of the lots, but could not go on on account of the caveat. Upon the return of the summons, the advocate for the purchasers read an affidavit by Chadwick admitting most of the facts alleged, but denying the absolute refusal to pay, and stating that he expected to have the money at least by 20th June. He also stated that $3,600 had been paid, but it does not appear when the additional $100 was paid.

It was only after the papers were left with me that I noticed that the originating summons was undated, was unsealed, and bore no stamp, and that the affidavits were neither filed nor stamped. I was strongly tempted to dismiss the whole application on these grounds alone, as there is not much use attempting to secure uniformity and regularity of practice, if advocates will persist in overlooking the most obvious rules in such a slipshod manner. I suppose, however, that these are mere irregularities which the Judge is expected to be indulgent enough to overlook. Just how far advocates expect the Court to go I cannot say, but there must surely be a limit at some point. Upon the argument, I received little, if any, assistance from the advocates, considering the gravity of the whole question. The practice, of course, is not settled, as the statute is new. The advocates, therefore, practically contented themselves with saying, the one that I ought to set aside the caveat, the other that I ought not, without argument or reasoning of any kind.

I am left, therefore, to determine the questions involved upon such grounds as appear to me to be reasonable.

Section 91 says: "And upon the hearing of such application, the said Court or Judge may take such order in the premises and as to costs as to such Court or Judge may seem just."

Section 92 says that "the Court or Judge may order that the caveator give such undertaking or security as such Court or Judge may consider sufficient to indemnify every person against any damage that may be sustained by reason of any disposition of the property being delayed or to answer the costs of the caveatee. . . . or may direct the caveator to take further proceedings by action or otherwise upon his caveat as may be just."

Section 93 is as follows: "In any proceedings taken in consequence of the filing of a caveat, if it be made to appear to the Court or Judge that the caveator or person on whose behalf the caveat has been filed by the registrar, as hereinafter provided, claims an interest in the land mortgage or incumbrance by virtue of any contract in writing for the sale and purchase of such land mortgage or incumbrance, signed by the vendor thereof or by his lawfully authorized agent, or by virtue of an assignment of such contract, duly attested in the manner provided for in sections 102 and 103 of this Act, and that there has been no default under the terms of such contract, or, if any default has been made, that such default has been cured before the return of the application to the Court or Judge, then the Court or Judge may, and, unless it otherwise appears to be a case in which the caveat should be removed, shall, refuse to order the removal of such caveat."

The contract in question contained the following clause: "Time is to be considered the essence of this agreement, and, unless payments are punctually made at the times and in the manner above mentioned, these presents shall be null and void and of no effect, and all moneys paid hereon shall be absolutely forfeited to the vendor, and the vendor shall be at liberty to peaceably re-enter upon and re-sell the said land, together with all buildings thereon, without notice to the purchaser, and the purchaser covenants not to remove any buildings whatsoever that may be erected on said land."

In view of this provision in the contract and of the admitted default of the purchasers, I am asked to direct the

removal of the caveat so that Riddock may exercise his right of resale given him under the contract, and the question is whether I should take that step in such a proceeding as this.

In an application under the same section of the Act, which was made before me some weeks ago (Re Babbitt and Boileau, ante 260), I decided to go into the merits of the dispute between the parties. The situation there was, however, somewhat different. The original existence of the contract alleged was disputed by the caveatee. The parties had been examined for discovery by consent, all the documents were before me, and every possible witness was brought personally into Chambers on the return of the summons. The issue of contract or no contract was already clearly defined, and the matter was not complicated by any payments of money which could affect the case. I, therefore, exercised the discretion which I conceived the statute gave me and decided to treat it as a trial of an action for specific performance. There was nothing to be gained by directing the commencement of an action, and no harm to be done by directing the removal of the caveat.

In this case, however, the parties are differently situated. Admittedly there was a contract made, and a large sum of money has been paid upon it. On account of a default in payment of one instalment, I am asked to direct the caveat to be removed. In order to give such a direction, I think I should have to decide a question which is not ordinarily decided except in an action commenced by writ of summons. I should have to declare that the contract in question had, in consequence of the default, become void, that is, I should have to declare a rescission of the contract, because it appears to me that if there is still a contract in existence between the parties, then the purchasers must have some rights under it, and these rights they ought surely to be entitled to protect by means of a caveat. I am not sure that it would have made any difference even if the caveat had not been filed until after 30th April, but, however that may be, the contract was clearly, owing to the extension of time which was given, still in existence when the caveat was filed, for the purchasers would have till 12 o'clock on the night of the 30th to make their payment. The purchasers clearly were entitled to file the caveat at the time they did. Owing

to the subsequent default, should I direct its removal? I cannot see how I can take that course in this case, and for this reason. In order to do so I should have to declare the contract rescinded. There would then be several other questions still undecided between the parties. What would become of the money paid Would Chadwick be entitled to get it back, and could I direct repayment in these proceedings? Would Riddock be entitled to damages, and could I grant them in these proceedings? Again, instead of ordering rescission, should I, as suggested by the purchaser's advocates, treat the purchaser as a mortgagor in default and give him time to redeem? All these questions involve very important principles of law. No argument was made upon them at all practically, and I cannot think it just to attempt to deal with them all while the matter stands in its present form.

It may, perhaps, be said that the provisions of sec. 93 indicate an intention in the legislature to authorize the Court to direct a removal of the caveat where there has been default under an agreement of purchase and sale. The general object of that and preceding sections is fairly well known. Owing to the numerous transactions of sale and purchase of land taking place in a new country like this, it was felt desirable that purchasers should be able, if not to register their agreements (which, it was thought, would involve a departure from our system of registering land titles), at least to protect themselves by the filing of a caveat, which, instead of lapsing as under the old system by efflux of time at the expiration of 3 months, would remain on file indefinitely. Protection is given to owners, by providing for such applications as this, for the removal of the caveat; but the grounds upon which the Court may remove the caveat are not specified. Section 93 says that, if the agreement is properly attested with an affidavit of execution, and there is no default in payment, the Court shall refuse to direct removal except there are other reasons for doing so. But the converse is not enacted. The statute does not say that if there is default the Court shall direct the removal. If there had been such a provision, the result, I think, would have been that such agreements would have been practically declared to be mortgages, and the parties to them mortgagors and mortgagees. It has been apparently left to the Court to work out the practice in the converse case in such

a manner as seems just and convenient, and it may be that in some cases the Court might think it proper to give a certain time for payment, as in the case of a foreclosure action, before directing the removal of the caveat. But, in view of the forfeiture clause in the present contract making time of the essence thereof, I do not see that I can adopt that course in this case. The vendor apparently insists that the contract is at an end, and his advocate made some suggestion as to the proper dealing with the case of a deficiency or an excess upon a resale. Now, I cannot think it wise to attempt to deal with such questions with the matter in its present shape. On the other hand, I am convinced that it was the intention of the legislature to provide some expeditious method of dealing with the removal of caveats which place obstacles in the way of owners who desire to deal with with their land. Section 92 already quoted says that "the Judge may direct the caveator to take further proceedings by action or otherwise upon his caveat or may make such other order as may be just." The caveator, however, is content to rest as he is, and, there being admitted default and other instalments not yet due, he is possibly not entitled to ask for specific performance or any other positive relief, while the caveatee, the vendor, has already taken proceedings as provided by the statute. In these circumstances it seems to me it would be absurd to direct the caveatee, Riddock, to commence another action by writ of summons claiming a declaration that the contract is rescinded. An action is already practically begun. The parties involved have been summoned and have appeared. What then is lacking? Nothing, it seems to me, except formal pleadings shewing definitely what the parties claim they are entitled to. I think one of the principal objects of the statute would be totally defeated if I were to dismiss this application and leave Riddock to commence a suit by writ of summons, which would get down to trial some time next fall. On the other hand, Riddock has $3,600 of the purchasers' money, and, as he was in any case apparently only making a profit of $500 on the sale to them, he is surely sufficiently protected for a time at least by having this money in his hands, and it is therefore unnecessary to consider the question of security to indemnify him against damage. The Calgary sittings are fixed for 4th June, and I therefore think that, in the absence of all precedent to guide me, I shall be doing substan-

tial justice by directing the filing of pleadings by the parties interested and the trial of the issues thus arrived at, at the next sittings here. No formal order need be taken out, but I now make the following order:—

1. The applicant Riddock is directed within 4 days of this date to file with the clerk and serve on the purchasers' advocates, Messrs. Millican and Millican, a statement of claim setting forth the facts relied upon by him and the relief he claims, whether absolutely or in the alternative, and describing himself as plaintiff and the purchasers as defendants.

2. The purchasers are directed within 2 days of the receipt of the statement of claim to file with the clerk and to serve upon Messrs. Reilly and McLean, the vendor's advocates, a statement of defence setting forth the facts upon which they rely, pleading to the statement of claim and stating what relief, if any, they claim to be entitled to.

3. The vendor is to then have 2 days to file and serve a reply, if he so desires, whereupon or in default of reply the pleadings shall be closed.

4. The case shall then be set down on the list of civil causes for trial at the ensuing Calgary sittings by the plaintiff, the vendor, in the usual way.

5. The parties are to make discovery of documents on affidavit within 3 days after issue is reached, unless dispensed with by the opposite party, and are to appear for examination on discovery, if the opposite party takes the usual proceedings for that purpose.

6. This order is not to be acted on by the clerk, and no other documents are to be received for filing, until the defects in the documents already before me are cured by proper stamps, dates, seals, and filing.

7. Costs reserved until trial.

NORTH-WEST PROVINCES.

(EDMONTON.)

SCOTT, J. MAY 27TH, 1907.

CHAMBERS.

CLINTON v. SELLARS.

Judgment Debtor — Examination of — Scope and Relevancy of Questions — Rule 380—Inquiring as to Property Alleged to Belong to Wife of Debtor.

Application by plaintiff for an order to compel defendant to answer certain questions which, upon his examination for discovery in aid of execution, he refused to answer.

C. A. Grant, for plaintiff.

J. C. F. Bown, K.C., for defendant.

SCOTT, J.:—It was admitted that the order for the examination was made under clause 1 of Rule 380. It therefore provided for the examination of the defendant as to any and what debts were owing to him at the date of the order, and whether he then had any and what property or means of satisfying plaintiff's judgment.

With one exception the questions which defendant refused to answer related to a hotel property in Ponoka, formerly occupied by him and his wife.

It appears from statements made by him and his solicitor during the examination that he asserted that she was at one time the owner of the property and that she had sold it. He admitted that she held a heavy mortgage upon it, apparently to secure the balance of the purchase money, and that while carrying on business upon the property the hotel license had been held in his name.

The questions were as follows:—

10. Did you run that hotel?

11. Did you have anything to do with that hotel?

14. Did you lease that property?

15. Did you sell that property?

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motion for an injunction, afterwards gave notice of abandonment, whereupon an order was made directing the plaintiff to pay the defendant's taxed costs of the motion. The question then arose on taxation as to the costs of preparing affidavits which had not been filed at the date of the abandonment. The Judge directed certain questions to be answered by the taxing masters, and they certified as follows: "We have always acted upon the principle that the costs of all work in preparing, briefing, or otherwise relating to affidavits or pleadings, reasonably and properly and not prematurely done, down to the time of any notice which stops the work, is allowable, and that the taxing master, having regard to the circumstances of each case, must decide whether the work was reasonable and proper and the time for doing it had arrived. We apply the same principle in taxing costs on discontinuance of action or dismissal of bill, and we have not made any change in practice in this respect since the Judicature Act." Jessel, M.R., acted upon the taxing masters' certificate.

The clerk was correct in taxing costs to the defendant.

NORTH-WEST PROVINCES.

(EASTERN ASSINIBOIA.)

ORE, J. MAY 30TH, 1907.

TRIAL.

SCOTT v. DALPHIN.

—Conviction — Notice of Appeal Signed by Clerk of ocate for Appellant—Want of Authority — Appeal hed—Costs.

ppeal by Margaret Scott from a conviction, which for hearing upon fresh evidence as at a trial, phin, the respondent, moved to quash the appeal.

Richardson, Grenfell, for the appellant.

C. McLorg, Moosomin, for the respondent.

RE, J.:—The notice of appeal was signed. "M. C. renfell, by her advocate B. P. Richardson, per at-

plaintiff had, by leave of the Court, before the defendants appeared, served them with a notice of motion for an injunction. The motion was heard and refused, the costs being made costs in the action. The plaintiff then discontinued, the defendants still not having appeared to the writ. The taxing master considered that he had no power to tax to the defendants the costs of the action, as they had not appeared. The defendants then took out a summons before North, J., who ordered that the plaintiff should pay the defendants the costs of the action, although they had not appeared. The plaintiff appealed. The Court of Appeal, consisting of Fry and Lopes, L.JJ., held that the defendants were entitled to their costs. Fry, L.J., delivered the judgment of the Court and he is reported as follows: "He said that the only point in favour of the plaintiff was the old practice of the Court of Chancery. It was contended that that practice was still in force, and that it applied to the analogous case of discontinuance before appearance of the defendant. But Rule 1 of Order XXVI. governed the practice as to discontinuance, and it said that, when a plaintiff discontinued his action, 'thereupon he shall pay the defendant's costs of the action.' In His Lordship's opinion that was not necessarily confined to discontinuance after appearance of the defendant; it did not make the appearance of the defendant a condition precedent to the payment of his costs. And it was consistent with justice that the plaintiff should pay the defendant's costs. For, though before appearance the defendant had no locus standi to take any step in the action, proceedings might be taken against him (as in the present case) by the plaintiff, and yet, if the defendant was successful in such proceedings, he would, if the argument for the appellant was well founded, be deprived of the costs of them." I adopt that ruling and the reasons for it. I have only to add that the defendant before discontinuance may have incurred costs relating to the action which he would be compelled to pay to his advocate, and I think it is but just that he should have the remedy, as far as taxable costs are concerned, over against the plaintiff, who has inadvisedly or without cause brought an action against him.

It may be urged that a difficulty might arise as to what costs were to be taxed. The case of Harrison v. Leutner, 16 Ch. D. 559, lays down the principle upon which the taxing officer should be governed in such cases. The plaintiff in that case, having served the defendant with notice of

motion for an injunction, afterwards gave notice of abandonment, whereupon an order was made directing the plaintiff to pay the defendant's taxed costs of the motion. The question then arose on taxation as to the costs of preparing affidavits which had not been filed at the date of the abandonment. The Judge directed certain questions to be answered by the taxing masters, and they certified as follows: "We have always acted upon the principle that the costs of all work in preparing, briefing, or otherwise relating to affidavits or pleadings, reasonably and properly and not prematurely done, down to the time of any notice which stops the work, is allowable, and that the taxing master, having regard to the circumstances of each case, must decide whether the work was reasonable and proper and the time for doing it had arrived. We apply the same principle in taxing costs on discontinuance of action or dismissal of bill, and we have not made any change in practice in this respect since the Judicature Act." Jessel, M.R., acted upon the taxing masters' certificate.

The clerk was correct in taxing costs to the defendant.

NORTH-WEST PROVINCES.

(EASTERN ASSINIBOIA.)

WETMORE, J. MAY 30TH, 1907.

TRIAL.

SCOTT v. DALPHIN.

Appeal—Conviction — Notice of Appeal Signed by Clerk of Advocate for Appellant—Want of Authority — Appeal Quashed—Costs.

An appeal by Margaret Scott from a conviction, which came on for hearing upon fresh evidence as at a trial, John Dalphin, the respondent, moved to quash the appeal.

B. P. Richardson, Grenfell, for the appellant.

E. A. C. McLorg, Moosomin, for the respondent.

WETMORE, J.:—The notice of appeal was signed. "M. C. Scott, of Grenfell, by her advocate B. P. Richardson, per at-

torney A. Gowler, of Grenfell, Saskatchewan." It was objected that this notice was insufficient, Gowler not having authority to sign. The Act is silent upon the question as to whom the notice should be signed by; that being so, I think it is quite clear under the authorities that it may be signed by an advocate, but I am of opinion that it cannot be signed by the clerk to the advocate, unless it is expressly shewn that he had authority to sign. In this case no authority for Gowler to sign was proved. Regina v. Justices of Kent, 42 L. J. M. C. 112, was cited on behalf of the appellant, but I am of opinion that that case does not bear out his contention. There the notice of appeal was signed by the clerk with the express authority of the appellant.

The consequence is that this appeal fails by reason of the notice not being sufficient. The appellant must pay the respondent's costs of this appeal. In taxing these costs, however, the clerk will allow no costs for fees of the trial or incidental to the trial in any way. He will allow the costs incidental to the application to quash the appeal, and he will allow witness fees to Dalphin, but in so doing he must bear in mind that he was concerned in three other appeals, and he will only be entitled to his proportionate fees for travelling and attendance.

NORTH-WEST PROVINCES.

(EASTERN ASSINIBOIA.)

WETMORE, J. JUNE 3RD, 1907.

TRIAL.

RICHES v. TOWN OF WOLSELEY.

Contract—Work and Labour — Bridge Built for Municipal Corporation—Contract for Day Labour — Counterclaim for Breaches of Warranty—Recovery by Both Parties — Costs.

Action to recover the amount contracted to be paid by defendants to plaintiff for work and labour, and counterclaim by defendants for breach of warranty.

D. H. Cole, Wolseley, for plaintiff.

Levi Thomson, Wolseley, for defendants.

WETMORE, J.:—The plaintiff agreed to build for the defendants a suspension wire foot-bridge across a dam in the town of Wolseley, for which he was to be paid $5 a day and his board and the price of a ticket to Winnipeg and return. He warranted that the bridge would be entirely satisfactory; that it would not have more than 4 or 5 feet of a sag; that it would have no side-swing; that it would be strong; and that it would be not less than 2 feet above high-water mark. These warranties were not filled in any respect. It was a most unsatisfactory structure; it had a great deal more than 5 feet of a sag; the side-swing was very bad; it was not a strong bridge; and, instead of being at least 2 feet above high-water mark, it was so low that at high-water mark it would be considerably under water. It was contended on the part of defendants that in view of these breaches of warranty the plaintiff was not entitled to recover anything for his services. I am of opinion that this contention is not correct. If the contract had been to pay him a lump sum for his work that would have been an indivisible contract, and I think defendants might possibly have set up the breaches of warranty in view of their character as an answer to the action; but, inasmuch as the agreement was to pay $5 a day, the contract was divisible, and the plaintiff had a right to demand his pay each day as the work progressed. The only remedy the defendants have, therefore, is upon their counterclaim. The plaintiff claims for 19½ days' work and for 25 days' board. The defendants disputed the fact that he had worked this time, and I find that he worked 15½ days, which at $5 a day would amount to.....$76 25
I also find that he is only entitled to 18 days' board 18 00
There is no dispute as to the railway fare, which is 15 60

This will amount to 109 85
From this deduct 39 00

paid the plaintiff and on account of board. The plaintiff is therefore entitled to recover..... 70 85

The defendants are entitled to recover under their counterclaim damages with respect to the breaches of con-

tract which I have referred to, but the evidence with respect to those damages is of a most unsatisfactory character. The only witness called with respect to damages was E. Banbury, and he had apparently a very vague idea as to what they were. The most I can make them under the evidence is $50. I am satisfied, however, that there was a great deal more, but, if I cannot get the material to base a satisfactory judgment upon in this respect, it is the fault of the defendants themselves in not coming with proper testimony to allow me to do so. The defendants will therefore have judgment for $50 on their counterclaim.

The plaintiff will have the general costs of the action. The defendants will have the costs of their counterclaim, including the costs of their witnesses. All the witnesses on the part of the defendants were called for the purpose of proving that the warranties in question were given and the breach of them, except that there was some testimony to establish that the plaintiff was charging for more days' work than he was entitled to, and in this the defendants were successful. No witness fees will be allowed for witnesses called on the part of the plaintiff, who testified exclusively as to the character of the plaintiff's work. When the costs are taxed, one judgment shall be set off against the other, and the party in whose favour the balance may be shall have execution therefor.

NORTH-WEST PROVINCES.

(EASTERN ASSINIBOIA.)

WETMORE, J. JUNE 4TH, 1907.

CHAMBERS.

RE GRAY.

Infant — Custody — Parental Right — Adoption — Habeas Corpus.

Application by Robert T. Gray, the father of the infant Vina Almira Gray, for a writ of habeas corpus ad subjiciendem to issue to Jesse Balkwill, commanding him to have the

body of Vina Almira Gray brought before the Judge in Chambers. This writ was asked with a view to having the infant restored to the custody and parental control of her father.

W. A. Nisbet, Moosomin, for the applicant.

T. D. Brown, Moosomin, for Jesse Balkwill.

WETMORE, J.:—Affidavits were read on behalf of Jesse Balkwill at the return of the summons in which he alleges an agrement between himself or his wife and Gray for the adoption by the Balkwills of this child. It appears from these affidavits that Gray's wife had left his household and refused to live with him, and has never lived with him since, and it was considered under such circumstances that the Balkwills were more fit and proper persons to have the custody and control of the child than Gray, and therefore the agreement was made for the adoption of the child by the Balkwills, and Gray, in pursuance of that agreement, brought her over to where all the parties then lived, near Deloraine, Manitoba, and placed her in the custody of the Balkwills. This was in March, 1903, and the child has been with the Balkwills ever since, except when Gray took possession of her at Graytown, in this province, and took her to his place and had her in his posession for a couple of days. Jesse Balkwill, however, at the expiration of that time, again got possession of her. All the parties interested are now residing at or near Graytown, in this province. It was also asserted in the affidavits produced on the part of the Balkwills that it was not in the interest of the moral welfare of the child that she should be returned to the possession of Gray. This seems to have been based, however, purely upon the alleged fact that Gray had no females in his house to look after the child. Affidavits in answer were filed on behalf of Gray, and he entirely and positively denied that any agreement whatever was made whereby the child was to be adopted by the Balkwills, and he states that the child was left there at the request of the Balkwills, and temporarily, as a companion to Mrs. Balkwill while Balkwill and Gray went out locating homesteads, and that Mrs. Balkwill subsequently from time to time requested him to allow the child to remain with her; that he never had any intention of giving up the custody of the child to the Balkwills or of allowing them to adopt her. This child at the time she was

left with the Balkwills was about 3 years of age; she would now be therefore about 7 years of age. I do not consider it necessary to determine which version of this transaction is the correct one, because I am of opinion that, assuming the statements of the Balkwills to be true, they have no right to the custody of this child. The alleged agreement of adoptino was not in writing. I do not know that that, however, makes any difference. In Roberts v. Hall, 1 O. R. 388, Boyd, C., lays down the following at p. 404: "The general rule is indisputable, that any agreement by which a father relinquishes the custody of his child, and renounces the rights and duties which, as a parent, the law casts upon him, is illegal and contrary to public policy." This case of Roberts v. Hall, as well as later cases, lays down the law that there are circumstances under which the Courts will give effect to an agreement of adoption, and in which they will give the custody and control of the child to a person other than the parent; and the circumstances under which they will do so are when it is clearly for the moral benefit of the child, and, in some cases, when it is for his material interest. In Regina v. Gyngall, [1893] 2 Q. B. 232, Lord Esher, M.R., at p. 242, said: "The Court must, of course, be very cautious in regard to the circumstances under which they will interfere with the parental right;" and then, after quoting from what was laid down by Knight Bruce, V.-C., in In re Fynn, 2 De G. & S. 457, he goes on: "That is a clear statement that the Court must exercise this jurisdiction with great care, and can only act when it is shewn that either the conduct of the parent or the description of person he is, or the position in which he is placed, is such as to render it not merely better, but—I will not say "essential"—but clearly right for the welfare of the child in some very serious and important respect that the parent's rights should be suspended or superseded." I can find nothing in this case which would warrant me in suspending or superseding the right of the parent. The affidavits disclose that he is a man able to support the child, of good moral character, a regular attendant at bible class and church services, and causing his children to regularly attend Sunday-school, day-school, and church—he is the father of other children besides Vina Almira. And, in so far as his having females in his house to look after the child is concerned, the affidavits disclose that his daughter Cora, a young girl of 17

years of age, keeps house for him and is competent to look after the child. In addition to that, it is contemplated that an aunt of these children is about to reside with Gray. I can find that there is nothing under such circumstances which would lead me to the conclusion that it would be any more in the moral interest or the material interest of the child to leave her with the Balkwills than it would be to restore her to the parental control.

There will be an order therefore for the writ of habeas corpus to go.

NORTH-WEST PROVINCES.

(EASTERN ASSINIBOIA.)

WETMORE, J. JUNE 19TH, 1907.

TRIAL.

NEUDORF TRADING CO. v. WANLESS.

Contract — Sale of Goods—Action for Price—Payment to Plaintiffs' Vendor—Substituted Contract — Novation — Wages—Set-off—Counterclaim—Costs.

Action for the price of goods sold. Counterclaim for wages, etc.

Levi Thomson, Wolseley, for plaintiffs.

E. L. Elwood, Moosomin, for defendant.

WETMORE, J.:—Questions were raised as to the admissibility of some testimony in this case. I have not considered it necessary to determine whether it was properly admitted, as the testimony has not affected my judgment in the slightest respect. The inclination of my mind is that the testimony was immaterial to the issues in question as between the parties hereto, and was therefore improperly received.

The plaintiffs had purchased from the Wm. Gray & Sons Co. (whom I will hereinafter call "The Gray Co."), a number of carriages, buggies, and democrats for the price of $685.50, payable 1st December, 1905. After these goods

arrived the plaintiffs sold them to the defendant. That is, they turned them over to him, and he was to pay the Gray Co. for them. It was, no doubt, in the minds of the plaintiffs and defendant to induce the Gray Co. to accept the defendant as their debtor for these goods and release the plaintiffs; in other words, to substitute a contract by novation between the Gray Co. and the defendant, and this was attempted, but the Gray Co. never consented to it. They never released the plaintiffs from their liability; they were willing to do so if the defendant complied with certain conditions, namely, by giving certain security which they mentioned, but the defendant did not comply with these conditions, and the Gray Co. never accepted him as their debtor in lieu of the plaintiffs. The Gray Co., however, sought for and obtained from the defendant some promissory notes taken by him on the re-sale of some of these carriages, etc., but as collateral only. These notes, or some of them, were paid at or after maturity to the Gray Co., and as a matter of fact were the payments hereinafter mentioned as being made by the defendant on the plaintiffs' claim herein. I shall have occasion to refer again to the circumstances attending the obtaining these notes by the Gray Co. This action was brought on 9th December, 1905, and up to that time defendant had paid the Gray Co. $320, leaving $365.50 due upon their sale. The action is also brought for a quantity of linoleum, amounting to $11.65. and for a pair of fence-plyers, some lumber, and a writing pad, amounting altogether to some $2.60. The defendant proved at the trial that the linoleum had been paid for. The $2.60 items are not disputed. After the commencement of this action the defendant paid the Gray Co. the whole amount due them in respect of their sale except $150. The defendant sets up that this action, in so far as the price of the carriages, etc., is concerned, was improperly brought, because the defendant's agreement was to pay the Gray Co., not the plaintiffs, this price except the sum of $150, which he admits was to constitute a credit to the plaintiffs in an account between him and the plaintiffs. At the time that these carriages, etc., were turned over to the defendant, there was no arrangement whatever made in respect to any sum of $150. The arrangement was that the whole of the price of these goods was to be paid to the Gray Co. Nor does the evidence satisfy me that any subsequent arrangement was made with respect to the $150, whereby it was to constitute a credit

to plaintiffs in the account between plaintiffs and defendant, as set out in the statement of defence, or whereby it was in any way distinguished or to be considered differently from the rest of the price of the carriages, etc., nor does the evidence establish that the Gray Co. extended the time for defendant to pay the price, or agreed to do so, as stated in the defence. Defendant, however, sets up that plaintiffs could not have any right of action against him until they paid the Gray Co. what remained due after maturity of their claim. I cannot find any reported case that assists me in deciding that question. I am of opinion, however, that the action was properly brought by plaintiffs for the price of these carriages etc. There was no novation, and there was no privity of contract between the Gray Co. and the defendant; they could not sue him for the price; they could sue the plaintiffs. The relation of seller and buyer existed between plaintiffs and defendant, and I think the arrangement to pay the Gray Co., to whom the money was eventually to come, was merely one to avoid the inconvenience of the money going through unnecessary hands, that is, that it might be paid directly to them, and it would be considered a payment to the plaintiffs, with whom the defendant was in privity. The defendant's conduct leads me to the conclusion that he looked upon the transaction somewhat in the light that I do. In August, 1905, the Gray Co., through one McGinn, their agent, were pressing for some of the notes taken by the defendant for these carriages, etc., to be handed over to them as collateral security on account of their claim. The defendant declined to do so until he got an order from the plaintiffs, and McGinn thereupon procured the following order:

"Neudorf, Assa., Aug. 24th, 1905.

"To G. F. Wanless, Esq.,

"Please deliver to J. J. McGinn buggy settlements to the amount of five hundred and thirty dollars ($530.) to be applied on account of the Wm. Gray & Sons Co., Limited.

"The Neudorf Trading Co., Limited,

"per Jno. C. Miller."

Why the defendant should want an order of this sort from the plaintiffs to warrant his handing over these notes to the Gray Co. I cannot imagine, unless he considered that he was primarily responsible to the plaintiffs. At the trial he seemed to be disposed to make a sort of a double shuffle.

That is, in so far as $150 was concerned he wished to concede a direct present liability to the plaintiffs, because that amount was equal to a set-off he had for wages, and which I will hereinafter refer to, and as to the balance of the price he wished to set up that there was no direct present liability.

Defendant pleaded a set-off and counterclaimed for $150 for two months' wages under an alleged hiring by plaintiffs. I am of opinion that the weight of evidence establishes, and I find, that plaintiffs authorized Temple to hire defendant for a time to commence on the defendant's arrival at plaintiffs' place of business at Neudorf. But defendant is not entitled to two months' wages; he arrived on 16th December, 1904, and his services ceased on 13th February, 1905. No question arises as to improper dismissal or improperly leaving the employment.

The account stands as follows:

Price of carriages, etc.		$685 50
Paid before action by proceeds of notes delivered by defendant to the Gray Co.	320 00	
		$365.50
Paid Gray Co. after action brought by proceeds of notes so delivered	215 50	
		$150 00
Price of fence plyer, lumber, and writing pad	2 60	
		152 60
Allow defendant by way of set-off:		
Wages from 16th December to 13th February, 1 month, 28 days, at $75 a month	$145 00	
2 sacks of bran	2 50	147 50
Judgment for the plaintiff for		$ 5 10

with the general costs of the cause. The defendant will be allowed no costs of his counterclaim, as the matter was matter of set-off and not of counterclaim.

NORTH-WEST PROVINCES.

(EASTERN ASSINIBOIA.)

WETMORE, J. JUNE 29TH, 1907.

CHAMBERS.

IMPERIAL ELEVATOR CO. v. JESSE.

Mortgage — *Foreclosure — Second Mortgagee — Rights of Execution Creditors — Practice — Originating Summons —Affidavit—Intituling—Irregularity—Waiver.*

Application by plaintiffs, by originating summons, for an order for foreclosure.

W. A. Nisbet, Moosomin, for plaintiffs.

T. D. Brown, Moosomin, for defendants.

WETMORE, J.:—The property is a quarter section of land, and it is the homestead of the defendant Jesse. On 18th February, 1904, he executed a mortgage to the Hamilton Provident and Loan Society for $800. This mortgage was registered on 26th February, 1904. On 20th August, 1905, he executed a mortgage to plaintiffs for $400.60. This mortgage was registered on 6th September, 1906. After the registration of the mortgage to the Hamilton Provident and Loan Society, and before the registration of the mortgage to plaintiffs, the defendants Krause and the Balfour Implement Company caused execution at their respective suits against Jesse to be registered against the lands of Jesse.

I am of opinion that the defendants Krause and the Balfour Implement Company were properly made parties to this proceeding, and, while the summons is intituled against all the defendants, the affidavit of William John Bettingen, upon which the originating summons was issued, is only intituled as against the defendant Jesse. Objection was taken to the proceedings by reason of this error, and, no doubt, it is an irregularity, but, inasmuch as both the defendants Krause and the Balfour Implement Company appeared to the summons by advocate on 26th February, and asked for a sale, and appeared again on 8th March and asked

for a sale, and it was only on 15th March that objection was raised to the irregularity in the intituling of the affidavit, I am of opinion that this is a case where I may, under Rule 306 of the Judicature Ordinance, receive the affidavit, and I will order it to be received accordingly.

The next question that arises is whether the defendants Krause and the Balfour Implement Company have any rights against this land as against the plaintiffs, by virtue of the registration of their executions. I am of opinion that the case comes within what was laid down by the Supreme Court of the North-West Territories en banc in Bocz v. Spiller, 2 W. L. R. 280, and that these defendants have no interest by virtue of their registered executions against the property in question, in so far as plaintiffs' mortgage is concerned. There is no subsequent mortgage to the plaintiffs; and I do not know whether or not the property is worth more than the two mortgages against it or not. The plaintiffs are entitled to foreclosure, subject to the mortgage of the Hamilton Provident and Loan Society.

NORTH-WEST PROVINCES.

(EDMONTON.)

SCOTT, J. JULY 2ND, 1907.

CHAMBERS.

CRAMER v. BELL.

Costs—Taxation — Depositions Taken under Foreign Commission — Admissibility — Practice — Return of Commission—Opening by Clerk.

Appeal by defendant from the taxation by the clerk of plaintiffs' bill of costs.

J. R. Boyle, for defendant.

O. M. Biggar, for plaintiffs.

SCOTT, J.:—Plaintiffs abandoned some of the items objected to, and the only items now in dispute are those relating to the costs of an order issued by plaintiffs for the examina-

tion of witnesses abroad and of the examination had thereunder.

It appeared upon the argument that at the trial plaintiffs' counsel tendered the depositions of the witnesses taken under the order as evidence upon an issue joined between them and defendant as to the ownership of certain horses, the subject matter of the action, the depositions relating solely to that question, and that defendant's counsel objected to their admission. Upon referring to the notes of the trial Judge's judgment, I find that he intimated that, as he was satisfied, apart from these depositions, that plaintiffs were the owners of the horses, he would not determine the question of their admissibility.

The only objection to their admissibility raised before me was that the order and certain depositions attached thereto were found in the clerk's office without any cover, and that there was nothing to shew that they ever had been enclosed in any cover.

The order provides that the depositions shall be sent by registered mail to the clerk, enclosed in a cover under the seal of the commissioner, and that upon their return either party should, upon one day's notice, be at liberty to open the same.

Upon examining the depositions, I find that they appear to be depositions taken in pursuance of the order, and purport to be signed by the witnesses, and are authenticated by what purports to be the signature and seal of the examiner named in the order.

As the order does not direct that the examiner should indorse upon the cover any memorandum of its contents, it may be, and I think the probability is, that the clerk, upon receiving the packages, opened it as he would open any ordinary letter or package addressed to him. In view of this, I think that the depositions should not be held inadmissible on the ground of the objections taken, as they were found in the proper custody and appear to have been properly taken.

I have not seen the pleadings, nor have I referred to the whole of the judgment, and I am therefore unable to determine whether plaintiffs are entitled to the costs of the issue respecting the ownership of the horses. I hold, however, that if they are entitled to these costs, they are en-

titled to tax the costs of the order referred to and of the examination held under it and the costs incident thereto.

As each of the parties has in part succeeded on the appeal, there will be no costs to either.

NORTH-WEST PROVINCES.

(EDMONTON.)

SCOTT, J. JULY 3RD, 1907.

CHAMBERS.

RE WEBSTER AND CANADIAN PACIFIC R. W. CO.

Land Titles Act—Caveat—Motion to Set aside—Questions of Law—Discharge of Caveat—Action to be Brought — Dominion Lands Act — Agreement for Sale of Land by Homesteader before Recommendation for Patent—Railway Act — Lands Taken for Railway — Ascertainment —Purchaser for Value without Notice.

Application by one Webster to remove a caveat registered by the railway company against certain lands near Stettler.

O. M. Biggar, for the applicant.

C. F. Newell, for the railway company.

SCOTT, J.:—On 14th April, one Hanson, who was then in possession of the lands as a homesteader under the Dominion Lands Act, but who had not then obtained his recommendation for patent, entered into an agreement with the company to sell and convey to them all his right, title, and interest in and to such portion of the land as might be required for right of way and for station and other purposes, for a branch line proposed to be constructed by the company. On 9th April, 1907, Webster, the applicant, purchased the lands from Hanson, having previously ascertained, by a search in the proper registry office, that Hanson held a clear certificate of title thereto, except a claim under a caveat registered by one Von Roggen, which caveat was after-

wards removed, and on 13th April, 1907, Webster obtained a clear certificate of title.

On 15th August, 1905, the company deposited in the proper registry office a plan, profile, and book of reference, shewing the location of the right of way over the lands of their proposed branch railway, and on 7th May, 1907, the company registered the caveat now sought to be removed, thereby claiming an equitable interest in the land under the agreement with Hanson.

It was contended by counsel for the applicant that the company were not entitled to any interest in the property under the agreement with Hanson, for the following reasons:—

1st. Because the agreement, having been entered into by a homesteader before recommendation for patent, is void, under sec. 42 of the Dominion Lands Act, as amended by 60 & 61 Vict. ch. 29, sec. 5.

2nd. Because there is nothing in the Railway Act which authorizes a homesteader before recommendation for patent to sell or agree to sell lands for railway purposes.

3rd. As it was not shewn that the lands were not set out and ascertained within one year from the date of the agreement, the applicant, being a purchaser without notice, is not bound by it: see sec. 188 of the Railway Act.

In Flanagan v. Healy, 4 Terr. L. R. 391, it was held by Wetmore, J., that an agreement by a homesteader before recommendation for patent to convey his interest in the homestead was void for all purposes, and the Court of Queen's Bench in Manitoba, in Harris v. Rankin, 4 Man. L. R. 115, expressed the same view.

That question, as well as those raised by the other contentions referred to, are so important that I ought not to dispose of them upon this application. It would be unreasonable, however, that the company should be permitted to maintain the caveat for an indefinite period, even though no time is fixed by the agreement for its performance. I therefore direct that the caveat shall be discharged at the expiration of one month from this date. This will give the company time to take the necessary proceedings to enforce their rights under the agreement, or to have such rights declared. If such proceedings are taken within that time, the costs of this application will abide the result of such proceedings; if no such proceedings are taken within that time, the applicant to have the costs of the application.

NORTH-WEST PROVINCES.

(EASTERN ASSINIBOIA.)

WETMORE, J. JULY 4TH, 1907.

CHAMBERS.

RE MORROW AND LINDSAY.

Arbitration and Award—Motion to Enforce Award—Practice —Affidavit Proving Submission and Award — Commissioner Taking Affidavit — Advocate for Applicant—Intituling of Affidavit — Irregularities — Leave to Supply Defects—Adjournment—Costs.

An application by Morrow to enforce an award in his favour made by two arbitrators, Switzer and Neil.

W. A. Nisbet, Moosomin, for Morrow.

H. Y. Macdonald, Moosomin, for Lindsay.

WETMORE, J.:—A number of objections were taken to the application being allowed, some of which were based on points of practice. There is no affidavit proving the submission or award. There is a memorandum of oath attached to the submission by one Parsons, the subscribing witness. This was sworn before B. P. Richardson, who appears by his affidavit used on this application to be advocate for Morrow. I am not prepared to say that it was objectionable to make the affidavit before Mr. Richardson; that oath was not made for the purpose of being used in Court. It is an oath such as is generally attached, and is required to be attached, to transfers of real property and bills of sale and chattel mortgages with a view to registration, and I do not consider that an advocate acting as a conveyancer is acting in his capacity as advocate or attorney. I express no opinion, however, whether this oath was sworn before the proper officer. It is quite sufficient to state that it is not sufficient for the purpose of this application. The affidavit for the purpose of this application should be intituled in the Court and in the matter of the arbitration. The award is verified in the same way—by the oath of Gowler, the subscribing witness; also sworn before Mr. Richardson. There was a

joint affidavit by the arbitrators, which, if it had been properly sworn, might have verified the submission and the award, but the jurat to that affidavit does not contain the names of the deponents, or state that it was sworn by both deponents, and is therefore clearly bad under Rule 301 of the Judicature Ordinance. There is also an affidavit by Mr. Richardson which verifies two documents as copies of the submission and award. That, in my opinion, is not sufficient. The submission and award should be directly proved, and not proved in this indirect way. It was urged that in so far as the submission was concerned the matter of proof was immaterial, as it was necessary that the submission should be before me. The difficulty about that is that it is before me, and was brought before me by Morrow, that is, it was attempted to be laid before me, and what purports to be a copy of it is before me, and the counsel for Lindsay raised a somewhat serious objection to the award, namely, that it did not comply with the terms of the submission. Possibly if Morrow had not brought the submission before me, Lindsay would have, and it is too late now for Morrow to set up that the submission is of no moment. It is unnecessary at present to give a decision on the merits of this application. I will allow Morrow to take the submission and award off the files and prove them by a proper affidavit. I think this case is different from the case I decided the other day, wherein I held that a person must stand or fall by the material on which he obtained his summons, because in that case there was an attempt to bring in entirely different matter from what was produced on the application for the summons. In this case the requisite proof was attempted but not properly made, and I merely allow him to rectify that mistake—not to produce new material before me. I see no distinction between allowing that to be done and allowing an affidavit to be taken off the files and re-sworn, which is a common practice. The irregularity of the proceedings in this matter—I may say, the repeated blunders—has prevented the judgment being given now, and will cause Lindsay's advocate to appear again. Morrow must pay the costs of the blunder. I will postpone this case until Friday 18th October at 10 a.m. Morrow's advocate to have leave to take the submission and award off the files for the purpose of having them properly verified, and Morrow will pay Lindsay or his advocate the costs of attending at the argument on 6th May, which I fix at $10.

NORTH-WEST PROVINCES.

(WESTERN ASSINIBOIA.)

NEWLANDS, J. JULY 9TH, 1907.

TRIAL.

JORDISON v. ROSS.

Principal and Agent—Authority of Agent—Sale of Horse—Wrongful Detention by Purchaser as against Principal —Damages.

Action to recover $125 from defendant for his wrongfully detaining plaintiff's horse. The defence was that defendant purchased the horse from one George Watt, who was the duly authorized agent for the sale of the horse.

J. A. Allan, Regina, for plaintiff.

W. M. Martin, Regina, for defendant.

NEWLANDS, J.:—The evidence is that the plaintiff put the horse in Graham's stable on 10th November, and that he told George Watt, who was an employee at that stable, that he could sell the horse for $85 while it was in the stable. Another witness, C. R. Humphrey, swears that the horse was left by plaintiff in Graham's stable for keep or sale at $85, and that he and all the other employees of the stable, including Watt, had the right to sell it while there at that price. Watt left the employ of the stable about 1st December, and on the 12th of that month plaintiff made an agreement with Watt to keep the horse for him until spring, and no authority was given Watt to sell him, and on that day Watt took the horse away from Graham's stable. On 22nd December, Watt sold the horse to defendant for $77.50. Watt sold the horse as his own property.

Under these circumstances I find that Watt had no authority to sell the horse for plaintiff after he left the stable. The defendant does not attempt to shew that Watt had such authority, excepting from the fact that Watt had been given authority to sell the horse while in the stable, and that this authority had not been revoked. I think, however, that it was proved that Watt had only power to sell

while the horse was in the stable, and any authority he had was revoked when he made the agreement to keep the horse for plaintiff until spring. Besides, he did not sell it as plaintiff's horse, but as his own, and for a less price than he was authorized to sell it while in the stable.

In Smith v. McGuire, 27 L. J. Ex. 465, Pollock, C.B., said that the question to be decided in cases of this sort is, "Has the person who is to be charged with liability authorized and permitted the person who has professed to act as his agent to act in such a manner and to such an extent as that from what has occurred publicly, persons dealing with him have a reasonable right to conclude and to draw the inference that the person so acting is a general agent."

The evidence in this case is to the effect that Watt had no such authority, and that plaintiff had done no act to hold him out as a general agent.

As to the measure of damages, I think they should be fixed at the value of the horse at the time defendant purchased him. Although he sold him in the spring for $125, he had kept him all winter and had put the extra value on him, and plaintiff was at no expense for his keep during that time.

Judgment will therefore be for plaintiff for $85 and costs.

NORTH-WEST PROVINCES.

(WESTERN ASSINIBOIA.)

NEWLANDS, J. JULY 9TH, 1907.

TRIAL.

HURLBURT v. BAYLEY.

Sale of Goods—Contract—Sale on Trial—Contradictory Evidence — Refusal to Accept — Purchaser not Returning Goods — Sale of Goods Ordinance, sec. 35.

Action to recover the price of a drill sold to defendant.

T. T. Grimmett, Fillmore, for plaintiff.

F. W. G. Haultain, K.C., for defendant.

NEWLANDS, J.:—This is an action for the price of a drill. The agent of plaintiffs who sold the drill swore that the drill was sold on two days' trial, and was to be returned if not suitable. He and two other witnesses swore that it worked as well as any drill they ever saw.

The defendant and one witness swore that it was a single disc drill, and, if it did not work, plaintiffs were to give double discs in place of the single. Also, if the drill worked well, defendant was to keep it; if not, he was to pull it on one side and leave it. They both swore that the drill did not work well. It was proved that defendant notified plaintiffs that the drill did not work well, and that he drew it on one side and left it for plaintiffs.

As to the contract, the evidence is contradictory, excepting as to the fact that defendant was to have it on trial, and, as I cannot find the other facts from the evidence, sec. 35 of the Sale of Goods Ordinance will apply. This section is as follows: "Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them."

As it is proved that defendant did this, there will be judgment for defendant with costs.

NORTH-WEST PROVINCES.

(WESTERN ASSINIBOIA.)

NEWLANDS, J. JULY 10TH, 1907.

TRIAL.

WITHEY v. FRANCOMB.

Building Contract—Extras—Onus — Date of Completion — Quality of Work—Mechanics' Liens—Constitutional Law —Mechanics' Lien Ordinance — Priority of Lien over Mortgage—Ultra Vires—Land Titles Act.

Action by Thomas Withey, contractor, of the city of Regina, against P. Francomb, also of Regina, to recover $84.

balance alleged to be due to plaintiff by defendant in connection with the building of a house for defendant. The $84 covered extra work alleged to have been done. The contract price for building the house was $90, defendant Francomb to supply all materials. On 8th October, 1906, plaintiff registered a mechanics' lien against the building. Jessie A. Waddel, of Perth, Ontario, was made a co-defendant by reason of a mortgage held by her on the land upon which the house was built. The mortgage was dated 14th July, 1906.

The defence was that the work had been performed in an unworkmanlike and improper manner, material had been wasted, and the house had been built on the wrong lot of land.

C. E. D. Wood, Regina, for plaintiff.

T. A. Allan, Regina, for defendants.

NEWLANDS, J.:—I think the plaintiff completed his work in a proper and workmanlike manner, taking into consideration the kind of a house to be built and the price to be paid for it. There was no date fixed for the completion, and I do not think plaintiff took an unreasonable time to finish it under the circumstances. There is no evidence to satisfy me that plaintiff improperly used material provided by defendant, nor that the house was built on the wrong lot. As to the extras, the burden of proof is on the plaintiff, and, as there is one witness on each side, I hold that he has not proved that they were extras, and not part of the original contract, excepting the claim for making stove pipe hole and fitting thimble, which is allowed him.

I do not think the Saskatchewan Act continues in force any laws excepting those that were intra vires of the legislature of the North-West Territories, and therefore in force at the time that Act came into force. The provision of the Mechanics' Lien Ordinance giving liens a preference over a mortgage to the amount of the increased value of the property is, in my opinion, ultra vires, as it conflicts with the Land Titles Act, 1894.

The plaintiff will have judgment for $45 balance due, $3 for extras, and $6.50 for drawing and registering lien. a total of $54.50, with costs, with an order for the sale of the property, subject to the mortgage, if not paid within 30 days. The action is dismissed against defendant Waddel with costs.

NORTH-WEST PROVINCES.

(WESTERN ASSINIBOIA.)

NEWLANDS, J. JULY 16TH, 1907.

TRIAL.

LEIB v. LEIB.

Husband and Wife — Action for Alimony — Adultery of Wife—Bar to Action.

Action for alimony.

R. Rimmer, Regina, for plaintiff.

W. M. Martin, Regina, for defendant.

NEWLANDS, J.:—This action is brought for alimony, on the grounds of desertion, cruelty, and adultery on the part of the husband, and these grounds were proved to be true by evidence given at the trial. The defence was adultery on the part of the plaintiff subsequent to the desertion of her by her husband. Two witnesses swore that they had seen the plaintiff and one Walter Albright in bed together at night. Both the plaintiff and Walter Albright swore that they had not been in bed together on the occasions mentioned. I see no reason why I should not believe the evidence of the two witnesses who swore they saw plaintiff in bed with Albright; they are not interested in these proceedings, and there was apparently no reason why they should not have told the truth. On the other hand, there was every reason why the plaintiff and Walter Albright should deny the fact, and I cannot accept their evidence against two disinterested witnesses. The evidence given by the two witnesses referred to is sufficient, in my opinion, to prove the adultery alleged against the plaintiff.

It was argued by Mr. Rimmer, counsel for plaintiff, that adultery of a wife after desertion was no bar to an action for alimony, and he cited Goodden, [1891] P. 1, where it was decided that the Court had the power to grant alimony in the case of a judicial separation for cruelty on the part of the wife. In giving the judgment of the Court of Appeal Kay, L.J., states: "The granting or refusing of alimony

after a divorce a mensa et thoro seems to have been a matter upon which the Ecclesiastical Courts exercised a large discretion. It appears to have been their practice not to grant alimony to a wife divorced a mensa et thoro on the ground of her adultery, but no doubt is thrown upon the jurisdiction of the Court to do so. See White v. White, 1 Sw. & Tr. 591."

In Ontario, where the statutory provisions as to granting alimony are exactly similar to our own, it has always been held that adultery was a bar to an action for alimony against a husband. See Severn v. Severn, 14 Gr. 150, where the Court deprived the wife of alimony and exonerated the husband from paying the same under an existing decree, on account of adultery committed by her. Also Nelligan v. Nelligan, 26 O. R. 8, where a Divisional Court held in appeal that the only bar to an action for alimony against a husband who is living separately from his wife is cruelty or adultery on the part of the applicant.

In this case I have found the wife guilty of adultery, and will therefore dismiss the action.

NORTH-WEST PROVINCES.

(WESTERN ASSINIBOIA.)

NEWLANDS, J. JULY 17TH, 1907.

TRIAL.

BIRD v. CANADIAN PACIFIC R. W. CO.

Railway — Injury to Person Crossing Track — Crossing not at Highway and not Sanctioned by Board of Railway Commissioners—Negligence — Non-compliance with secs. 242 and 243 of Railway Act—Fences at Crossing—Invitation to Public—Costs.

Action for damages for personal injuries sustained by plaintiff owing to the alleged negligence of defendants.

J. F. Frame, Regina, for plaintiff.

J. A. Allan, Regina, for defendants.

NEWLANDS, J.:—On 19th February, 1906, the plaintiff with her son was crossing the defendants' railway at McLean, on a crossing which the company had made across their railway, when the horses became frightened and shied, and the waggon and team fell over the side of the crossing, and the plaintiff was injured, for which injury she claims $5,000 damages. This crossing was not at a public highway. There is a public highway some distance further east, but, because it goes through the yard of the defendants and crosses several tracks, it has never been opened by the defendants, and is not used to any extent by the public. The crossing in question was made by the defendants some time in August, 1905, but it has never been recognized by the municipality of South Qu'Appelle, within which it is situate, as a public highway, the municipality always insisting that a crossing should be made on the public road further east, and at the present time have an application before the Board of Railway Commissioners to compel the defendants to open this road. The crossing now in use on which the accident occurred has not been sanctioned by the Railway Commissioners.

The negligence on the part of the defendants alleged by the plaintiff is non-compliance with the provisions of secs. 242 and 243 of the Railway Act, ch. 37, R. S. C. 1906. These sections require, amongst other things, that any structure by which any highway is carried over or under any railway shall be so constructed and at all times be so maintained as to afford safe and adequate facilities for all traffic passing over, under, or through such structure, and a good and sufficient fence, at least 4 feet 6 inches in height from the surface of the approach or structure, shall be made on each side of such approach and of the structure connected with it. The crossing in question was not fenced, and the plaintiff contends that it is too narrow to be a safe crossing. These provisions of the Railway Act apply only to a highway crossing the railway track. This crossing was not there previous to the building of the road, but was only made in August, 1905. It is not the continuation of any street or public road, but was made by defendants instead of grading the public road which I have mentioned, across their tracks.

It was held by the Chief Commissioner of the Board of Railway Commissioners in In re Reid and Canada Atlantic R. W. Co., reported in 4 Can. Ry. Cas. 272, that there is no Court or authority other than this Board which can make it

lawful for either the railway company or any other body to construct highways across the line of railway." This decision is one which I think is binding on me, as there is an appeal from the Board on questions of law and on the jurisdiction of the Board to the Supreme Court of Canada only, and until that Court reverses this decision I think I must take it as the correct interpretation of the powers of the Board under the Railway Act. Upon this question I would also refer to McKay v. Grand Trunk R. W. Co., 34 S. C. R. 81, and Grand Trunk R. W. Co., v. Perrault, 86 S. C. R. 671.

As I have already stated, the Board has not sanctioned the opening of this crossing, and it is not therefore a highway under the Railway Act, and the defendants would therefore be under no obligation to fence it under sec. 242 of the Railway Act.

The plaintiff further contends that, because the defendants have built this crossing and put up a sign "Railway Crossing," they have invited the public to use it, and therefore must make it safe for such purpose, and that by not doing so they were guilty of negligence. The plaintiff contended that the crossing was not properly constructed and was not wide enough. I think this was not proved; it was, in my opinion, both wide enough and so constructed as to be reasonably safe. She also in her evidence laid stress upon the fact that the approaches to this crossing were not fenced, and that by fencing it the defendants would have made it much safer to use. Is the neglect to fence in this case negligence? The approach to the crossing where the accident happened was about 12 feet wide, and, under ordinary circumstances, could be used with perfect safety, the plaintiff's son, who was driving, having used it previously with safety, and being apparently well acquainted with it. In Wood v. Canadian Pacific R. W. Co., 30 S. C. R. 110, the Chief Justice, Sir Henry Strong, at p. 112, said: "It is not, of course, every omission to do something which would have avoided an accident which constitutes negligence in law. In order that a duty should be imposed upon a person the neglect of which constitutes an actionable wrong, it must be apparent that the want of care or attention is reasonably likely to endanger the safety of others. It is not sufficient that the omission did in fact cause an accident, if it was not to some extent obvious that such a consequence was likely to result from it." Can it then be said in the present case that not fencing this approach was so obviously likely

to result in danger to persons using it, that it constituted negligence? I do not think it can. The approach had previously been used safely by plaintiff's son and others, and the accident would not have happened when it did if plaintiff's horses had not become frightened and shied, thus throwing the waggon over the side of the approach to the ground below.

The plaintiff, therefore, in my opinion, cannot recover.

As to the question of costs, I think I should deprive the defendants of them. They had no right to build the crossing where they did without the permission of the Railway Commissioners, and, if that permission had been obtained, they would have had to comply with the Railway Act, and fence it, and, as they have not, therefore, performed their duty to the public, I think judgment should be for defendants without costs.

NORTH-WEST PROVINCES.

(WESTERN ASSINIBOIA.)

NEWLANDS, J. JULY 19TH, 1907.

TRIAL.

STEELE v. McCARTHY.

Vendor and Purchaser — Contract for Sale of Land—Payment by Instalments — Default — Rescission — Time of Essence of Contract—Interest—Notice of Cancellation.

Action for a declaration that a certain contract for the sale and purchase of land was in full force and effect and to restrain the defendant from dealing with the land.

J. F. Frame, Regina, and T. S. McMorran, Regina, for plaintiff.

C .E. D. Wood, Regina, for defendant.

NEWLANDS, J.:—On 22nd May, 1905, defendant agreed in writing to sell to plaintiff the whole of section 25 in township 16, range 19, west of the 2nd meridian, for $9,600, and plaintiff agreed to pay defendant for the land the said amount in 3 equal annual instalments of $3,200 each, the

first of such instalments to be paid on 1st November, 1907. In the meantime plaintiff was to have possession of the land, and to pay interest in advance at the rate of 7 per cent., computed from 1st November, 1905, the first payment of interest to be at that rate. The plaintiff also agreed to break 400 acres of the land during the year 1905, and 220 acres during the year 1906. On or about 5th November, 1905, the plaintiff made the first payment of interest, namely $672, which was accepted by defendant, and in February, 1906, the plaintiff having failed to break 75 acres of the 400 agreed, it was agreed between the plaintiff and defendant that plaintiff should pay defendant the sum of $300 in lieu thereof. On the part of the plaintiff it is stated that this sum was to be in advance of interest payable on 1st November, 1906, and was to bear interest at 7 per cent., and by defendant that it was to be held by him and applied on principal when a final settlement was made. This payment was made by cheque, on which plaintiff made a memorandum of the agreement as he states it, and he also mentions the same fact in his letter to defendant enclosing the cheque. In spite of this corroborative evidence, it seems to me that defendant's version of the agreement is more likely to be correct, as otherwise on 1st November, 1906, defendant would neither have the $300 as security nor the breaking, unless in the meantime plaintiff broke an extra 75 acres, in which event the money would be freed to be applied on interest. This, however, plaintiff did not do.

On 1st November, 1906, the payment of interest due on that date was not made by plaintiff, and on the 2nd of that month defendant wrote him the following letter:

"Regina, Sask.,
Nov. 2, 06.

"A. B. Steele, Esq.,
W. Derby, Vt.

"Dear Sir,

I find that the terms of the agreement of sale of sec. 25, 16, 19, that interest which should be paid in advance on $9,600 at 7 per cent. has fallen due on Nov. 1st, 06.

"This interest has not been paid, and according to the terms of the contract, the agreement is void.

"Please accept this notification thereof.

Yours truly,
"E. J. McCarthy."

This letter was addressed to plaintiff as his home, West Derby, Vermont, U.S.A., and sent by registered letter. Plaintiff was away from home when the letter arrived, and did not return until the 28th of that month, when he received the letter, and on the next day he wired to one Arthur Bell in Regina, who was interested with him in this land, to tender defendant $360, which, with the $300 the defendant held, and the interest on it, he contended would make the payment of interest due. He also wired to defendant as follows:

"Newport, Vt., Nov. 29, 06.
"Via Winnipeg, Man. 29.
"Ed. McCarthy,
"Regina, Sask.

"Just arrived home and received your notice. Have wired Arthur Bell, Regina, to pay you three hundred and sixty dollars which with three hundred and interest thereon advance February sixteenth last makes six seventy-two. Wire immediately if Ok.

"Asa P. Steele."

Bell immediately made a tender to defendant as directed, but defendant refused to accept same. Bell on the next day made another tender to defendant of $672, but defendant also refused to accept that sum. On 26th March, 1907, plaintiff again made a tender to defendant, which was also refused, of $1,135.35, being for interest due and an allowance for breaking not done during the year in 1906, as required by the agreement. Under the agreement plaintiff was to break 220 acres during the year 1906, but he only broke about 100 acres, and the balance of the breaking has never been done. Plaintiff paid the amount last tendered into Court, and claims a decree: (1) declaring the notice of cancellation of 2nd November, 1906, to be void; (2) declaring the contract in full force and effect; and (3) an injunction restraining defendant from dealing in any way with the land.

Defendant contends that time was of the essence of the contract, and the payment of interest not having been made on 1st November, 1906, as agreed, he had the right to and did cancel the agreement of sale. The agreement of sale provides (10) that "time shall be in every respect the essence of this agreement," and

"7. Provided that in default of payment of the said moneys and interest, or any part or parts thereof, on the days and times aforesaid, or of performance or fulfilment of any of the stipulations, covenants, provisoes, and agreements on the part of the purchaser herein contained, the vendor shall be at liberty to determine and put an end to this agreement, and to retain any sum or sums paid thereunder, as and by way of liquidated damages, in the following method, that is to say—by mailing in a registered package a notice signed by or on behalf of the vendor intimating an intention to determine this agreement, addressed to the purchaser at——post office; and, at the end of 20 days from time of mailing the same, the said purchaser shall deliver up quiet and peaceable possession of the said lands and premises, or any part thereof, to the vendor or his agent immediately at the expiration of said 20 days."

The plaintiff contends that because there is a clause in the agreement which provides that all interest on becoming overdue shall be forthwith treated as purchase money, and shall bear interest at the rate aforesaid, it was not the intention of the parties that time should be of the essence of the agreement, but, as was pointed out by Hunter, C.J., in Peirson v. Canada Permanent Mortgage Corporation, 1 W. L. R. 99, these two stipulations are common ones generally found in agreements of sale, and are quite consistent. He says: "The time clause is a stipulation inserted for the benefit of the vendor, which he may enforce if he chooses, but, if he does not choose to enforce it, then the other clause provides that he shall get interest at the rate of 8 per cent. from 1st April, 1904, both before and after the purchase money becomes due, until the amount is paid."

I am of opinion that time was of the essence of the agreement in this case, and that, as plaintiff did not make the payment at the time agreed, defendant had the right to cancel the agreement.

This was done by sending the letter of 2nd November, 1906. This letter was addressed to defendant at his home in Vermont, U.S.A. Now in the clause providing for this notice of cancellation to be sent, there is no address, the space in the printed form where the address should be filled in having been left blank. Plaintiff's counsel argues from

this fact that it was not the intention of the parties to use this particular clause, and therefore there is no provision in the agreement for sending a notice of cancellation. The evidence does not shew this, but it does shew that the plaintiff's address at any particular time of the year was uncertain. His home was in Vermont, but he resided in Saskatchewan for a part of the year, and travelled in other parts of the West. It seems to me that the reason for leaving the address out was this uncertainty of the plaintiff's whereabouts at any particular time. The clause was not overlooked, however, because the word "his" is written in in one place where a blank was left. I think that, seeing there is no fixed place for sending this notice to, it would have to be sent to the plaintiff's residence at the time, and that the clause would be complied with by proof that plaintiff had received the notice, and, as he admits receiving it, I think defendant has done all that was required of him under the agreement.

It may seem hard on the plaintiff that the contract was immediately rescinded by defendant on his failure to pay the interest on 1st November, 1906. This, however, was the right of the defendant, and, if the right is to be exercised, it should be done promptly. As Vice-Chancellor Wigram in Hunter v. Daniel, 4 Hare at p. 432, said: "I agree with the defendants that each breach on the part of the plaintiff in the non-payment of money was a new breach of the agreement, and that, time being the essence of the contract, each breach gave the defendant the right to rescind the contract, but that right should have been asserted the moment the breach occurred."

I am of the opinion that there was a breach of the contract by the non-payment of the interest due on 1st November, 1906, that time was of the essence of the contract, and that the defendant by his action of 2nd November, 1906, rescinded the contract, and, as the same is now at an end, the plaintiff is not entitled to the relief asked for.

As I have accepted the defendant's version that the $300 was deposited with him on account of not completing the breaking of 400 acres in 1905, that amount will have to be returned by him to defendant. Defendant will have the costs of action.

YUKON TERRITORY.

JUNE 10TH, 1907.

FULL COURT.

SALANDER v. JENSEN.

Attachment of Debts — Affidavit to Lead Attaching Order — Affidavit on Information and Belief—Necessity for Stating Grounds — Rules 382, 394.

Appeal by plaintiff from order of MACAULAY, J., setting aside his own order and garnishee summons issued under Order 32, Rule 382, of the Yukon Ordinance, which provides as follows: "Any plaintiff in an action for a debt or liquidated demand, before or after judgment, and any person who has obtained a judgment or order for the recovery or payment of money, may issue a garnishee summons, in the form or to the effect of form C in schedule hereto, which summons shall be issued by the clerk, upon the plaintiff or judgment creditor, the solicitor or agent, filing an affidavit (a) shewing the nature and amount of the claim or judgment against the defendant or judgment debtor, and swearing positively to the indebtedness of the defendant or judgment debtor to the plaintiff or judgment creditor; (b) stating to the best of the deponent's information and belief that the proposed garnishee (naming him) is indebted to such defendant or judgment debtor."

Under this Rule the plaintiff applied for the garnishee summons, and in the affidavit upon which the application was based swore to the debt of the judgment debtor, and the only reference to the garnishee was contained in paragraph 3 of the affidavit, which was as follows: "To the best of my knowledge and belief H. Plagman and Fred Rice (the garnishees) are indebted to the said defendant."

The appeal was heard by DUGAS and CRAIG, JJ.

Joseph Clarke, for plaintiff.

Frank J. McDougal, for defendant.

CRAIG, J.:—It is contended by the respondent that an affidavit on information and belief must contain the grounds

of that information and belief, and that our Rule 294 applies to all such motions, the Rule being as follows: "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted." The English Rule respecting garnishees is somewhat different from our own, in this respect, that it provides for the issue of the garnishee order upon an affidavit by the plaintiff or his solicitor of a judgment being recovered unsatisfied, the amount, and that any other person is indebted to such debtor. The difference, it will be seen, is this, that our rule simply says, "stating to the best of the deponent's information and belief that the proposed garnishee is indebted," while the English Rule provides for a positive affidavit of indebtedness. There is also a similar Rule in the English practice regarding affidavits on information and belief to ours, and that is Order 38, Rule 3: "Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to belief with the grounds thereof may be admitted."

It is contended by the appellant that our Rule requiring a statement of the grounds of information and belief is not applicable to garnishee applications, but that the Rule respecting garnishee applications stands by itself, unincumbered or affected by any other of the Rules of our procedure. I do not think that that contention is sound. No authority is given for it, and I see nothing in the text nor in the reading of the Rule in question to indicate that that particular Rule is divorced from the body of Rules in our practice. I can find no authorities in our own practice nor in the practice of the North-West Territories upon this point, and we have to rely upon the English cases. The first case which I can find reported upon the matter is Coren v. Barne, 22 Q. B. D. 249. The head-note of this case states: "On an application for a garnishee order under Order 45, Rule 1, it is sufficient for the affidavit to state that the deponent is informed and believes that the garnishee is indebted to the judgment debtor. The application in this case was supported by an affidavit by the solicitor to the judgment creditor, stating that the deponent was informed and verily believed that the garnishee was indebted to the judgment debtor. Mathew, J., in Chambers, referred to the Court the question of the sufficiency of the affidavit, and the Court—Den-

man and Stephen, JJ.—granted a garnishee order nisi." This case appears to be strongly in favour of the appellant, if all that the affidavit contained was simply a bald statement that the deponent was informed and believed. The next case—and the case upon which the appellant relies—was Vinall v. Depass, [1892] A. C. 90. There the application was a similar one, and the head-note of the case is this: "In an affidavit in support of an application for a garnishee order under Order 45, Rule 1, of the Rules of the Supreme Court, the deponent need not swear positively to the existence of the debt due from the garnishee to the judgment debtor. It is sufficient if he states his information and belief as to the existence of the debt." Now, it appears, upon reading the full text of the judgment, that the deponent swore that he was informed by the managing director of the defendant company and verily believed that the garnishee was indebted to the defendant company in the sum of £100 and upwards for unpaid calls due in respect of 300 shares held by him in the defendant company. Vaughan Williams, J., to whom the matter was referred by the Master, was of opinion that an affidavit on information and belief on behalf of the judgment creditor was sufficient. The case finally went up to the House of Lords, which held that an affidavit on information and belief was sufficient on interlocutory applications such as this. Lord Macnaghten said: "I do not see in what other way a conscientious person can depose to matters not within his personal knowledge." And Lord Field said: "I have been of opinion that an affidavit in the terms or even not quite fully satisfying the terms of the one now before your Lordships, was a sufficient compliance with Order 45." It is well to observe the wording of this dictum; he says "in the terms of the one now before your Lordships," and it will be remembered that the affidavit did give the grounds of information and belief. Lord Hannen said: "The statute does not provide for obtaining the evidence of the person who can prove it in the ordinary sense; in short, it is not for the purpose of proof at all; it is, no doubt, for an inquisitorial purpose; it is to lay a foundation for calling the debtor or garnishee before a tribunal in order to ascertain whether he can deny that which is alleged against him, simply that he is indebted." From a full reading of this case it will be seen that the grounds of information and belief were involved in the arguments in Court as being part of the affidavit. Snow and Burney, in

commenting on this Rule and this judgment, say: "An affidavit that deponent is informed and verily believes that the garnishee is indebted to the judgment debtor is sufficient, provided it shews the ground of belief, but not otherwise;" quoting as an authority this very case and also Coren v. Barne, which I have cited above. The authors of that book of practice must have had more information about Coren v. Barne than appears in the reports if they can come to that conclusion. In Muir Mackenzie's Yearly Practice we find the same comment on the same Rule and the same case cited in support of it. The case of Vinall v. Depass is also reported in [1891] 1 Q. B. 216, where the report as to the contents of the affidavit is the same. There is also the case of In re J. L. Young Manufacturing Company, [1900] 2 Ch. 753, where it was held: "An affidavit on information and belief, not stating the source of the information and belief, is irregular, and therefore inadmissible as evidence, whether on interlocutory or final application, and a party or solicitor attempting to use such affidavit will do so at his peril as to costs." This, it is argued, is not a case upon a garnishee motion but an entirely different matter, namely, the settling of an order in a debenture holder's action. But in this case Lord Alverstone, C.J., Rigby, L.J., and the other Judges make no distinction apparently between various kinds of interlocutory applications or motions upon information and belief. Rigby, L.J., says that "every affidavit of that kind is utterly irregular, and, in my opinion, the only way to bring about a change in that irregular practice is for the Judge in every case of the kind to give a direction that the costs of the affidavit, as far as it relates to matters of mere information or belief, shall be paid by the person responsible for the affidavit." There is also the case of Lumley v. Osborne, [1901] 1 Q. B. 532, where it was held that "a statement of the plaintiff's source of information and grounds of belief that the person against whom the judgment summons was sought was a partner, is a material part of the form, and its omission from the affidavit would render irregular the issue of the summons and all subsequent proceedings thereon." This case may be somewhat distinguished from the others, in that the form of the affidavit provides that the grounds of the information and belief should be stated.

Dealing with our own Rule, if one considers the wording narrowly, I think he will be forced to the conclusion that

the deponent is not confined or intended to be confined to the very wording of the statute, that is, that the Rule directs what kind of evidence shall be given upon a motion of this kind, that is, information and belief evidence, not that the applicant shall come before the Court and swear to the words of the statute and to the very words of the statute, but that the intent and meaning of the Act shall be given effect to so that the Judge in issuing the garnishee order and calling upon a person to answer may have some grounds upon which to base his discretion as to whether he shall issue the order or not. If the matter were to be as contended by the appellant in this case, then what need of an affidavit at all? It is true that it may very seldom happen that either the plaintiff or his solicitor knows of his own personal knowledge of the facts necessary to prove the debt against the garnishee. In that case a præcipe would seem to be all that should be required by the Rule, but when an affidavit is required it presupposes some evidence shewing what moves the applicant to make the motion. The Rule does not say that the deponent shall swear in the following words, but that he shall swear in a certain manner, that is, give information and belief evidence; and if we consider the English Rule it will be seen that Vinall v. Depass is a strong case against the appellant's contention. There the affidavit required is that the garnishee is indebted, but the Court takes the very proper view that being simply a preliminary motion to bring the garnishee before the Court, positive affidavits of the debt shall not be required, but that only such affidavit as the person can make is required. All the affidavit that a person can make is to give all the information which he has and which enables him to come to the conclusion that the garnishee is indebted. I think that intention is carried out in our Rule as well, and I am of the opinion that the general Rule requiring affidavits upon information and belief is applicable as well to garnishee proceedings as to all other proceedings in this Court. This being my view, it is not necessary to consider the other questions raised as to the regularity of the præcipe, and the want of a judgment upon the order of the Judge before execution.

The appeal should be dismissed with costs.

DUGAS, J.:—The main difference between the English law and ours in garnishee proceedings is that a

garnishee summons can issue before and after judgment here, whilst in England it can issue only after judgment. in both cases, under Order 45, Rule 1, of the English practice, and under Rule 382 of our Judicature Act, it is, amongst other things, enacted that such a summons can be issued upon an affidavit of information and belief; and in both the English Act, under Rule 523, and our Judicature Act, under Rule 294, when an affidavit is based upon belief, the grounds thereof must be given. It is under this English law, from which our own has been inspired, that the different cases cited under Rule 1 of Order 45 in the Annual Practice have been decided, and by which, taking the whole together, it was ruled that "an affidavit that deponent is informed and verily believes that the garnishee is indebted to the judgment debtor is sufficient, provided it shews the grounds of belief, but not otherwise."

The deponent in this case did not shew his grounds of belief, and therefore his affidavit was not sufficient.

It has been said that a deponent giving such an affidavit for a garnishee summons could not be required to swear to facts about which, in the plurality of cases, he has no knowledge, as he cannot certainly know whether there is a debt due or not by the garnishee. This argument cannot stand, as, in giving his affidavit that he is informed and verily believes, he must have had the knowledge of some facts, either by hearsay or otherwise, which brought him to that belief or gave him that information, however light those facts may be; and it is an easy matter, under such circumstances, to give the grounds of information or belief. If such a groundless affidavit were so received, there would be no possibility of establishing bad faith or perjury on the part of the deponent. This might lead to many abuses against which third or disinterested parties should be protected.

I, therefore, quite accept the first reason given by the Judge below as amply sufficient to annul the proceedings taken under the affidavit given in this case; and am in favour of dismissing this appeal with costs in both Courts.

YUKON TERRITORY.

JUNE 10TH, 1907.

FULL COURT.

JONES v. JOYAL.

Mines and Minerals—Mining Act, sec. 23—Grants for Hill Claims —— Meaning of "Hill" — Miner Staking two Claims, one on each Side of a Creek — District Localities —Right to Stake without Abandonment.

Appeal by defendant from the judgment of the Gold Commissioner, dated 11th January, 1907, awarding to plaintiff the hill claim adjoining the left limit of number 7 above discovery on Last Chance creek, in the Yukon Territory.

The appeal was heard by DUGAS, CRAIG, and MACAULAY, JJ.

George Black, for defendant.

F. J. Stacpoole, for plaintiff

DUGAS, J.:—After reading the definition of a "creek" in sec. 2 of the Mining Act, with also secs. 6, 7, 8, and 23, I cannot come to any other conclusion than that a miner has the right to stake a claim on any "creek, hill, bench, bar, or plain."

In this instance the appellant Joyal had first staked, in 1902, on the right limit of Last Chance creek a bench or hill claim, and on 3rd October, 1906, he staked another bench or hill claim on the left limit of the same creek. It needs no argument to shew that they are really two different hills or benches. A hill or a bench on one side of a creek or river and a hill and a bench on the opposite thereof are surely two hills or benches. No doubt that under sec. 33 Joyal had the right to stake a claim on each side of the creek.

The plaintiff (respondent) staked on 9th October, 1906. Both applied for a record within the proper time. The appellant Joyal, being the first staker, was entitled to a grant, notwithstanding that he had not filed a declaration of abandonment of his first claim, as required by sec. 23, or that the sale which he had made of it had not been recorded, as

ordered by sec. 32, and I believe that the Gold Commissioner was wrong in ordering that the grant be refused to him, to be given to the respondent, Jones.

I am, therefore, in favour of maintaining the appeal with costs in both Courts.

CRAIG, J.:—This contest arises over the interpretation of sec. 23 of the Mining Act, which reads as follows:

"No person shall receive a grant of more than one mining claim on each separate creek, hill, bench, bar, or plain, except by purchase, unless he has abandoned the claim for which he has received a grant, and such abandonment has been duly recorded. If the owner of a claim, having acquired it by location, sells it, he shall not be permitted to locate again on the same creek, hill, bench, bar, or plain until the lapse of one year from the date of his locating the said claim."

Joyal, the defendant, on 3rd October, 1902, staked and obtained a grant for bench claim, second tier, upper half, right limit of 4 above the mouth of Last Chance creek, and sold the claim to Peter Allen and gave a bill of sale for it, which bill of sale was not recorded under the Act or Ordinance then in force. Subsequently, on 3rd October, 1906, he staked hillside adjoining the lower half of No. 7 on the left limit above discovery of Last Chance, and properly applied for the same on 11th October. On 9th October, 1906, plaintiff staked the last-named claim, and on the 10th applied for the same. It is admitted that both stakings and applications were in proper form, and the whole contest arises over the question of whether under sec. 23 a free miner may stake on every hill, bench, bar, and plain in the Territory, whether said hills, benches, bars, or plains front on, adjoin, or rise from the valley of the same creek.

In the same case before me the person staking staked on opposite sides of the creek, and in the one case he staked a bench and in the other a hill, so-called in the application, and so admitted to some extent in the argument of both counsel. The evidence in the case is most meagre. There is no evidence whatever to shew whether he staked on a hill or not. It is called a hill in the application. Counsel for the respondent entered into a somewhat elaborate argument upon the topographical features of the country, and what should be considered a bench and hill and creek, and cer-

tainly there is some justification for argument upon what these things mean, in view of the regulations. This mining code was expected to be a consolidation of all the wisdom acquired in the past years in mining matters here, as well as the experience of miners under the old regulations. It is a code complete in itself, by its enactment and force repealing and doing away with all former orders in council under which we previously acted, and we cannot refer to these orders in council, and I doubt whether we can refer to the experience gained under them, to help us in the interpretation of this Act. The particular section under consideration, considered in the light of the former orders in council and the experience of miners in this country, is certainly confusing. The policy of the former orders in council was that a miner should not stake more than one claim on each creek or gulch except a hill claim, the idea apparently being (and it was so interpreted under the former regulations) that a miner should have one creek claim and one hill claim adjacent to or in a sense pertaining to the creek upon which he had previously staked. There was no idea that a miner might stake on every hill or hillock along the whole line of a creek and thus by repeated staking claim title to as many claims as there were separate hills, locations, or hillocks. The matter is more confused also by the definition of "creek" given in the new regulations. A creek under sub-sec. 2 of the Act is defined as follows: "The expression 'creek' means and includes all natural watercourses, whether usually containing water or not." It is argued, and I think correctly, that this definition of a creek made by the statute includes rivers, rivulets, creeks, gulches, pups, and draws, when the same are natural watercourses. Now, along every creek in this Territory there are tributaries to the creeks, which are only gulches running back perhaps a few hundred yards or a shorter distance, which during freshets and rain-falls are natural watercourses, but which are dry at all other seasons of the year. That they are creeks despite of the fact that they are dry a great portion of the year we are forced to hold because the words of the interpretation clause are, "whether usually containing water or not." There is no definition of "bench" or "hill" in the Act. Are we to say that the hill meant by the Act is the rise of ground adjoining the valley of the creek, or must it be a more prominent elevation in the surrounding country? What

is a bench? Is it the flat terrace or flat ground which lies immediately above the first rise of the hill from the creek? How high must the hill rise from the creek before we can find a bench on top of it? Many of the creeks have high banks; others have lower banks which gradually undulate to the foot-hills of the adjoining mountains. Then if there is another rise beyond the first flat or plain on top of the first hill, can that be considered a hill? The dictionary definition of "hill," as laid down in the Standard, is: "A natural elevation of earth or rock rising conspicuously upon the ground at its foot; specifically, (1) one of the lower peaks or ridges forming the foot-hill or spur of a mountain range; an isolated peak or ridge of moderate elevation; the distinction between hills and mountains depends on local usage, which is largely determined by the configuration of the locality; (2) a rounded or conical eminence or undulation, sometimes of considerable height, formed by the action of water or wind, properly distinguished from a hillock, knoll, or natural mound by its greater mass and altitude." These definitions I take from the Standard Dictionary. The definitions of the other dictionaries is practically the same. Is the hill mentioned in 23 such a hill as is defined by the definition I have given? If it is, there is no evidence on the record to shew that the claim is staked on such a hill. Can we refer to the practice of the country and the former regulations to say what was meant by a hill claim? I am doubtful of that, and yet it would disturb the entire staking of this country if one could not refer to the former practice of the miners and the former regulations to determine what was in the mind of miners in this country when staking hill claims. I think I am safe in saying that the universal practice has been to recognize hill claims to be hillside claims, or the claims immediately adjoining the outer boundaries of creek claims, where the same abut upon the rise of the banks or hills next adjoining the valley of the creek. In some cases it is a fact that the creek claims do not exhaust the whole valley or flat of the creek, but that what might be called a plain extends from the outer boundaries or side boundaries of the creek claims on to the base of the hill rising from the plain; in other cases, that the creek claim not only takes in the creek valley and flat, but mounts over the crest of the adjoining hill and on to what is known as the bench beyond. There is no evidence to shew whereabouts this claim was

staked, topographically considered, and nothing whatever to help the Court in coming to a conclusion upon that part of the case. In the argument and upon the original trial of this case, a great deal seems to have been taken for granted, and judicial knowledge implied covering a lot of facts which should have been sworn to in evidence. If we are to consider the previous policy and what may yet be the policy of Parliament in passing this Act, it will be seen that to give a certain interpretation and the natural one to the words of this section will be to allow miners to stake innumerable claims along the valley or upon the hillsides of the same creek. It strikes me that this would almost reduce the Act to an absurdity, and I am afraid we are forced to arrive at that absurdity by the wording of the Act. I do not see how we can escape from it. Every watercourse as described, entering into the creek or cutting down the hills of it, produces a new hill according to the practice of miners, and perhaps according to the natural description of a hill, and it only depends, therefore, upon the number of gulches, greater or less in size, which cut into the main banks of the creek how many hill and bench claims can be staked, and while the general bench along the tops of the hills may be one extended plain or terrace, and but for the cutting down of the hill banks would be one bench, yet the curious condition arises that we may have innumerable hill claims on the same creek, and yet perhaps only one bench on each side, if the gulches are short. But the Act seems to be clear. It says that "no one shall receive more than one mining claim on *each separate* creek," hill, bench, etc,; that is, a man can stake a claim on every creek and gulch which is a watercourse, whether carrying water or not. Then he can stake a claim on every separate hill, on every separate bench, on every separate bar, on every separate plain, because the words are, "on each separate," etc. One cannot get away from this language, no matter what one knows of the previous practice and of the result which would ensue in carrying out the exact language of the statute.

I am, therefore, of opinion that, especially in this case, where it appears that in the one case he staked a bench on the left limit and in the other case a hill on the right limit, these are distinct and separate places and localities under the section of the Act, and that he had a right to stake in both without any abandonment.

Deciding as I do, it will not be necessary to consider the other question raised, whether a sale of a mining claim is or is not a sale under the 32nd section of the Act, unless the document of sale be registered with the Mining Recorder.

The appeal should be allowed with costs.

MACAULAY, J.:—The defendant staked this claim on 3rd October, 1906, and applied for record on the 11th of the same month. The plaintiff staked the same claim on 9th October, 1906, and applied for a record on the 10th October, 1906.

The plaintiff alleges that the defendant had staked and obtained a grant for bench claim on the 2nd tier opposite the upper half, right limit, of No. 4, above the mouth of Last Chance, on 6th August, 1902, and had never abandoned the same, as required by sec. 23 of the Yukon Placer Mining Act. The defendant alleged that he had transferred the said bench claim by bill of sale, which was never recorded, and, under sec. 32 of the Placer Mining Act, no sale is completed until the bill of sale is recorded.

The plaintiff entered a protest on 17th October, 1906, against the grant being issued to the defendant for the claim, and the Gold Commissioner gave judgment in favour of the plaintiff, upon the ground that the defendant not having disposed of the bench claim he staked in 1902, as required under sec. 32 of the Act, and not having recorded an abandonment of the same, as required by sec. 23 of the Act, he could not legally stake on Last Chance creek on 3rd October, 1906.

Section 2 of the Yukon Placer Mining Act is the interpretation section of the Act, and defines the expression "claim" and "placer claim," the expression "creek," the expression "ditch," and the expression "person," among other things, but does not define the expression "hill, bench, bar, or plain." Therefore, in my opinion, the only interpretation we can place upon these expressions is the ordinary interpretation placed upon them by the English-speaking dictionaries.

The expression "hill" is defined as "a natural elevation of less size than a mountain—an eminence rising above the level of the surrounding land." The expression "bench" in this instance means, "a mound or heap of earth rising

from a river—the sea; or forming the side of a ravine, or the like."

Section 23 of the Yukon Placer Mining Act is as follows: "No person shall receive a grant of more than one mining claim on each separate creek, hill, bench, bar, or plain, except by purchase, unless he has abandoned the claim for which he has received a grant, and such abandonment has been duly recorded. If the owner of a claim, having acquired it by location, sells it, he shall not be permitted to locate again on the same creek, hill, bench, bar, or plain, until the lapse of one year from the date of his locating the said claim."

In the case before us the claim staked by the defendant Joyal on 3rd October, 1906, was hill claim adjoining the left limit of No. 7 above discovery on Last Chance creek. The bench claim which Joyal owned was the second tier opposite the upper half, right limit, of No. 4, above the mouth of Last Chance creek. The one claim is a hill claim and the other a bench claim. There is nothing in the Yukon Placer Mining Act that I can find which deprives a man of holding a hill claim and a bench claim on the same creek, if there is a separate hill and bench on that creek, and much more, therefore, is there nothing in the Act to prevent a person from staking two hill claims or two bench claims on the same creek, if they are on separate hills or benches on that creek.

Section 23 seems to be the only section that deals with this matter, preventing a person from staking more than one claim on the same creek, hill, bench, bar, or plain. In this case the bench claim was staked on the opposite side of the creek from the hill claim, and could, in no sense, in my opinion, be taken to mean that it was on the same hill.

If this Act had been an amendment of the old mining regulations, one might come to a different conclusion, but it is a new Act substituted in place of the old mining regulations, which were absolutely repealed, and I can only come to the conclusion that Parliament meant what it said in sec. 23 of the Act.

It is admitted that the defendant Joyal was regular in his staking and in his application for record, and, being the prior staker, in my opinion, is entitled to a grant to the claim in question; and consequently, with all due respect to the Gold Commissioner, I am of opinion that this appeal

should be allowed with costs in this Court and the Court below, and that the defendant should be entitled to receive a grant for the hill claim adjoining the left limit of No. 7 above discovery on Last Chance creek.

YUKON TERRITORY.

JUNE 10TH, 1907.

FULL COURT.

MORLEY v. KLONDIKE MINES R. W. CO.

Arbitration and Award — Motion to Set aside Award — Misconduct of Arbitrators — Gross Undervaluation of Mining Claim in Question — Interested Motives Alleged against Arbitrators—Evidence—Disproof of Charges—Railway Act —Appeal from Order Refusing to Set aside Award.

Appeal by plaintiffs from judgment of MACAULAY, J., 5 W. L. R. 109, refusing to set aside an award of arbitrators appointed under the Railway Act, 1903.

The appeal was heard by DUGAS and CRAIG, JJ.

George Black, for plaintiffs.

C. W. C. Tabor, for defendants.

DUGAS, J.:—I have read the whole evidence, and I cannot find therein anything which would warrant us in coming to other conclusions than those to which the learned Judge arrived. To set aside such an award objections must be substantial; the award must be clearly bad, founded upon plain mistake of law or fact, or on fraud, partiality, misbehaviour, excess of authority, but not for erroneous judgment. This is what is gathered from the different authorities cited on the subject and those reported under the word "Award" at p. 704 et seq. of vol. 1 of the Digest of English Case Law.

No doubt, there is a great discrepancy between the value put on the claim by the arbitrator Cathcart and that of Coffee and Simpson, but nothing shews us that his opinion is better than that of the two others; that he has more

experience; or that his views should be accepted in preference to theirs. The fact of being employed by a large company, or having some claims to sell, in no way establishes any presumption against the two arbitrators Simpson and Coffee. It does not even raise a suspicion against them, and, even if it did, this would not be sufficient to establish any partiality or dishonesty on their part; more substantial evidence would be needed to do so.

It is very difficult to put any value on a mining claim. Witnesses will differ as much as the arbitrators have in this instance, and yet a value has to be established, and the law has not been able to find a better means than to leave it to the experience of men, who, on account of their calling their experience, and their knowledge of the locality, are, with the aid of whatever evidence they can obtain, in a better position than Judges sitting in courts of justice, to come to a proper adjustment of such claims. On that account the Courts will always be shy in interfering with awards of arbitrators under such circumstances, unless there are causes, as above described, which I fail to find in this case.

I am, therefore, in favour of dismissing the present appeal with costs in both Courts.

CRAIG, J.:—The Railway Act of 1903 provides, under sec. 168, for an appeal when the amount of the award exceeds $600. In this case the amount of the award was only $300. Under sub-sec. 3 of that section it is provided that "the right of appeal hereby given shall not affect the existing law or practice in any province as to setting aside awards." By sec. 12 of our Arbitration Act it is provided, sub-sec. 2: "Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the Court may set the award aside." This is exactly the same provision as we have in the Arbitration Act of England of 1889, sec. 11, sub-sec. 2.

The arbitrators were appointed duly, the umpire being the choice of both parties, appointed by consent. The evidence was taken under oath in part and in part by the arbitrators going on to the ground in question and making an inspection. The property in question is taken by the railway company for their right of way, and is a mining claim worked by the placer method, the owners contending that the value of the claim has been entirely lost by the

obstruction caused by the crossing of the railway; that it prevents them from dumping their tailings; that no culverts are left under the track to carry tailings or refuse through; and that in other ways the operation of the claim is entirely hindered by the construction of the road. The owners demanded $3,000 in an action brought, and on their proceedings the company made an offer of $300, the amount allowed by the arbitrators. Two of the arbitrators, the umpire and the one appointed by the company, concurred in fixing the amount at the sum offered by the company; the other arbitrator, Cathcart, dissented entirely in a strongly worded award, fixing the amount at $3,000. We have this remarkable thing happening, that two of the arbitrators give the exact amount offered and the other one the exact amount claimed. The evidence given by the owners on oath and which we have in the appeal book is entirely unsatisfactory. No definite information was given except a general idea of what they considered to be the value of their property. They apparently always had in mind that the arbitrators intended to go on the ground and inspect for themselves, and, as their counsel very candidly admits, that they were strongly of opinion that upon an inspection of the ground the award would be entirely in their favour, and for that reason they did not present as strong a case viva voce as they should have done. That was unfortunate, and it is also unfortunate that no record whatever of the proceedings of the arbitrators upon the ground is kept, what they did, what inspection they made, or what the result of the inspection was. We only have the award and the absolutely bald allowance of $300. No reasons are given by the arbitrators who fix that amount, for coming to that conclusion. If one were to decide upon the facts as they appear upon the appeal book, I would agree with the learned Judge who heard this motion in the first instance, that the award seems to be unreasonable, but, in the absence of the facts which arose on the personal inspection by the board, one cannot say that definitely. No misconduct is shewn on the part of the arbitrators, and no evidence is given that the award had been improperly procured. Certainly this Court cannot now set aside the award of the arbitrators upon the facts; neither upon the facts shewn can we do so nor upon the facts suspected, and not having the facts it would be entirely wrong for us now to disturb the finding of the board of arbitrators. We cannot say that the arbitrators proceeded upon a wrong

principle and improperly in law or improperly in the conduct of the proceedings arrived at their conclusion.

I have read all the cases cited by counsel and particularly the case of Grand Trunk R. W. Co. v. Coupal, 28 S. C. R. 531; Williams v. Jones, 5 M. & R. 3; Price v. Jones, 2 Y. & J. 114; and Russell on Arbitration, pp. 664 et seq. There is only one thing which might induce me to find for the appellants, and that is the allegation that the two arbitrators who made the majority award met alone without the other arbitrator. That is the assertion, and that assertion is based on the fact that their award is dated on 2nd August, 1906, while the award of the other arbitrator is dated upon 28th September, 1906. The minutes of the board are improperly kept in this, that they contained no record of these meetings and of what was done at them, and we do not know whether, as is suggested, the award was dated when all were present, or whether any discussion took place by the two alone without the presence of the third. We are only asked to infer from the dates that this is so, and certainly I am not prepared to do that, and upon that ground alone to set aside the award. It is clearly wrong for two arbitrators to meet and discuss their award in the absence of the third arbitrator and without notice given to him: see Daling v. Matchett, Willis 215, but upon the material before me I cannot say that that was done, and therefore I think the appeal should be dismissed with costs.

YUKON TERRITORY.

JUNE 10TH, 1907.

FULL COURT.

HARRIGAN v. KLONDIKE MINES R. W. CO.

Arbitration and Award — Motion to Set aside Award — Misconduct of Arbitrators—Gross Undervaluation of Mining Claim in Question — Interested Motives Alleged against Arbitrators — Evidence — Disproof of Charges — Railway Act—Appeal from Order Refusing to Set aside Award.

Appeal by plaintiffs from judgment of MACAULAY, J., 5 W. L. R. 137, refusing to set aside an award of arbitrators appointed under the Railway Act, 1903.

The appeal was heard by DUGAS and CRAIG, JJ.

George Black, for plaintiffs.

C. W. C. Tabor, for defendants.

DUGAS, J.:—This is a case similar to Morley v. Klondike Mines R. W. Co., ante, with the same arbitrators and the same discrepancy in the award, only that in this case the majority gave $200, instead of $300, to the plaintiffs, whilst Cathcart fixes the damages at $3,000.

As Mr. Justice Macaulay says in his judgment, the position of the plaintiffs (appellants) is weaker than that of the plaintiffs in the other case.

For the same reasons I consider that this appeal should also be dismissed with costs in both Courts.

CRAIG, J.:—In this case the same state of facts exist and the same reasoning applies as in Morley v. Klondike Mines R. W. Co., and therefore there will be the same judgment, that is, that the appeal will be dismissed with costs.

YUKON TERRITORY.

CRAIG, J. JUNE 14TH, 1907.

TRIAL.

GLEASON v. GARBUTT.

Contract — Work and Labour — Action for Wages — Miners' Lien Ordinance — Contest as to whether Plaintiff Working for Wages or under Lay Agreement — Conflict of Evidence — Perjury — Weight of Evidence — Costs.

The defendant Garbutt was the owner of a half interest in number 4 above Discovery on Sulphur creek, a placer mining claim, and the plaintiff was a working miner. The plaintiff sued the defendant for wood cut for the mining claim and for labour done between January and May of 1907, and upon that claim filed a lien under the Miners' Lien Ordinance.

C. W. C. Tabor, for plaintiff.

George Black, for defendant.

CRAIG, J.:—The contest in this case is mainly one of fact as to whether Gleason was working for wages as an ordinary hired servant or whether he entered into a lay agreement with Garbutt to work this mine on shares.

An extraordinary feature in this case is that the plaintiff and his wife, on the one side, and the defendant and his wife, on the other side, syear to an exactly contrary state of facts, contradicting each other squarely and fairly on every main issue raised. It is not a case where one or the other might be mistaken as to the terms of the contract. There are so many incidents and occasions mentioned by both parties where the agreement was either made or referred to and spoken of, forcing me to the conclusion that there exists a positive conspiracy on the part of one or the other to defeat justice by false swearing. Both the parties have an equal interest in misrepresenting the facts. The output of the winter's operations was entirely unsatisfactory and disappointing to both parties. The whole operations only produced the gross sum of $399, which sum would not half pay the wages of one man and would provide nothing at all for the expenses of operating. Gleason, of course, that being the output, is interested in proving that he was working for wages. Garbutt, on the contrary, is interested in proving that Gleason worked as his partner. If the output had been large, then Gleason would have shared in a large return, and in that cas it would have been to Garbutt's interest to shew that Gleason was working for wages. So, depending on the output of the claim, their interests are reversd.

The facts, as sworn to by both parties, are as follows. Gleason says that Garbutt came to him on the morning of 22nd January, awoke him out of bed, and told him to go to work for him; that the circumstances of that occasion were that he was got out of bed and that Garbutt proceeded down town and came back and had a conversation with him and hired him, and that he went to work; that no wages were mentioned; that he went to work from that time on and not a word was said about a lay agreement. Gleason's wife confirms him in this. Further, both Gleason and his wife swear that they kept his time upon a calendar, marking down each day that he worked, and also adding any extra hours of labour; and they produced the calendar to prove what they say. The calendar shews these markings; it also shews that the marking was very regular. What I mean by that is this, that the figures in almost every case shew the

same angle of inclination of the stroke, as if written with the one pencil and the one hand at the one time. However, it is sworn to positively that these entries were made day by day, shewing the intention of the parties. Gleason admits that at the times of the two clean-ups of the gold he went with Garbutt to his (Garbutt's) own house and saw the gold dried and blown and weighed; that on both occasions he remained for a meal at Garbutt's house, waiting until the gold was sufficiently dried to be put upon the scales. Garbutt says that Gleason asked him for a lay agreement some time in June of the year before; that he then refused him; that afterwards he gave a lay to two men—Waddell and Payson—and for some reason that agreement was cancelled, Waddell and Payson giving up their lay and leaving the claim; thereupon Garbutt says that Gleason renewed his request for a lay, but that it was not immediately granted; that Gleason then proposed that he and Garbutt should proceed to a place called Meadow Creek with their respective wives and there stake 4 claims and operate them in common; that they went to this place, found it not desirable to stake, and on their return trip the agreement was made that Gleason should go in with Garbutt upon a lay, and work number 4—Garbutt's property—in common. Garbutt says he told him that if he was willing to come in on the terms of the former laymen, he could do so, and that Gleason knew these terms, which were 25 per cent. to the owner and 75 per cent. to the laymen. Garbutt further says that Gleason actually weighed one of the clean-ups himself, and Mrs. Garbutt confirms this. Mrs. Garbutt swears positively that frequently Gleason expressed his regret to her that Garbutt had not taken him in on a lay instead of the other two men, and that after the men had abandoned their lay he repeated this statement, and that after he was actually taken in he expressed his great gratification that he had been able to get this chance because work was scarce in the winter, and that he could always get work in the summer; that repeatedly during the operations Gleason expressed his views about the output and always seemed very optimisitic. She says she had frequent talks with him because he was more optimistic about the result than Garbutt. She confirms Garbutt in this, that Gleason attended at the weighing up. She says that at Gleason's house this matter was discussed in the presence of Mrs. Gleason; this, Mrs. Gleason absolutely denies. Mrs. Garbutt

further says that Gleason told her and her husband (which is confirmed by Garbutt) that their share of the output would be at least $1,200. A witness called Hogan, a mine owner and operator, says that some time early in February Gleason asked him his opinion as to the best way to place the sluice boxes, whether under the dump or not. A witness called Kelly says he overtook Gleason one day on his return from work when wearing his workman's clothes, asked him what he was doing now, and Gleason replied—"I am working on a lay with Garbutt." This was during the time when the work is charged for. Gleason denies this conversation, but admits that Kelly did overtake him and that questions were asked about his work. He denies having any conversation with Hogan and asking his advice about the sluice boxes. But it is a singular fact in this connection that the sluice boxes were changed shortly after the time when Hogan says the conversation took place. Gleason admits that they were changed, and Garbutt says that they were changed on the suggestion of Gleason after he and Gleason had previously discussed the matter and had decided not to change them. Mrs. Garbutt swears that at the claim one day Mrs. Gleason asked the question, in the presence of all parties, "How will they know how much wood they are burning in the operation?" shewing some interest in the cost of operation. Mrs. Gleason admits this, but qualifies it by limiting it to "How will Garbutt know how much wood they are burning?" Mrs. Gleason also admits that her husband told her to be careful to leave the figures on the calendar intact when they were putting them down. It may be asked—why this care in keeping the figures clean and intact unless some dispute was anticipated? Garbutt kept no record of time, so he says, which, if true, is confirmatory of his contention. Then Garbutt swears that Gleason constantly suggested changes in the operation; that on one occasion, instead of sinking in an old shaft, he proposed sinking at another spot near the ice house. Gleason admits this, but says it was only a frienly suggestion which any workman might make, and Gleason also admits on cross-examination that he did say to Garbutt when suggesting these changes that "it made no difference to him."

If I were to rely entirely upon the testimony of the husband and wife in each case, I should have great difficulty in coming to a conclusion. Both the parties are apparently

respectable. They tell their stories in the box clearly, and one cannot say from their demeanour or manner that they are not telling the truth. There is an evident animus in all the parties. Mrs. Garbutt endeavoured to prejudice the Court against Gleason by suggesting his general dishonesty, and Gleason also endeavoured to do the same thing against Garbutt by suggesting dishonesty on the part of Garbutt against his co-owner in the claim. There is evidently a very warm feeling among the parties. There is clearly perjury on one side or the other; there can be no doubt about that. Who is guilty I cannot say. I must just decide this case upon the weight of the evidence. Against Gleason is the fact that there were no wages fixed. In his favour is the fact that he discussed with Hogan, whom I have no reason to doubt, the mode of working the claim and the placing of the sluice boxes; that he suggested a change in the operations of the claim while the work was going on; that his wife inquired as to the expenses in regard to wood; that he attended at the clean-ups and waited until the gold was weighed and the amount ascertained. Of course any workman might do this, but it is not reasonable to think that a workman would wait for a meal when he had his own home half a mile away and see the whole clean-up made. It is more reasonable to think that that was the act of a person who had an interest in the result and who remained there to watch and guard his own interest. There is the fact also that Garbutt consulted him about the hiring of a man in his place when he was sick, which he admits. Then there is the direct evidence of Kelly, who says that Gleason admitted or said he was working on a lay. I must decide for some one, and I just weigh this evidence, throwing into the scale on either side the evidence that tells one way or the other, and adopting this rule, as a jury I say that the probabilities and the reasoning from these facts lead me to give a judgment upon the facts in favour of the defendant.

Mr. Tabor, for the plaintiff, raises the defence of the Statute of Frauds; that the agreement, not being in writing and being a contract for an interest in land, cannot be enforced. This might be a very good answer if the action was one for specific performance. He cites the case of Smart v. Jones, 33 L. J. C. P. 154, and that of Webber v. Lee, 51 L. J. Q. B. 485. These authorities do not meet the case before me. This contract was wholly and fully performed and completed. And the case of Miles v. New Zealand Al-

ford Estate Co., 32 Ch. D. 266, is in point, where it was held that the Statute of Frauds should not be invoked against the defendant in the action; that a plaintiff may fail if the Statute of Frauds can be invoked against him, but he cannot in bringing an action invoke it as against a defendant defending an action. Also the case of Clark v. Grant, 14 Ves. 519, is to the same effect, and Leake on Contracts, 3rd ed., p. 255 et seq.

As to the question of costs, there is a balance coming to Gleason upon an accounting. It appears that at the last clean-up Gleason asked for a settlement. Garbutt replied that he could not give him one until the accounts came in for working expenses. Shortly after he met him with the account prepared and offered to shew it to him, but Gleason would not look at it. He also told Gleason that he had in a sack of gold dust which he had in his hands gold dust to pay him the balance coming to him, and told him what it was, but Gleason refused this. There was no actual offer either of currency or gold dust made and no payment into Court. Part of the amount sued for was entirely independent of the operation of the claim, that is, either as a wages proposition or a lay proposition, and was for wood cut for which the Ordinance gives a lien as well. But in this case there was a balance due on the wood which should have been offered in legal tender.

As to the division of the proceeds on the lay agreement, that, being a contract that they should divide the output of the dust, would be properly enough performed by offering the proper share of the gold dust, the output of the claim.

This suit does not come under the provisions as to costs of the Small Debts Ordinance, being Order 47, Rule 623. By the Lien Ordinance the proceeding is by an originating summons under the general provisions of the Act, and the costs are covered by the general Rules and particularly by the Miners' Lien Ordinance. Sub-section 8 of sec. 15 of that Ordinance is as follows: "In any case the Court or a Judge may proceed to hear and determine the matter of the lien and make such order as is just, and in case the person claiming the lien has wrongfully refused to give a discharge thereof, or has no just cause for his claim, or claims a larger sum than is found by the Court or Judge to be due, the Court or Judge may order and adjudge him to pay the costs of the other party."

The order in this case will be that the plaintiff recover $67.39 debt according to annexed account and the costs on the Small Debts scale. there will be no set-off of the superior costs against him. Mr. Garbutt will probably learn from having to pay the increased costs in this case to be more careful to have lay agreements in writing in future.

YUKON TERRITORY.

CRAIG, J. JUNE 15TH, 1907.

CHAMBERS.

CANADIAN BANK OF COMMERCE v. SYNDICAT LYONNAIS DU KLONDIKE.

Judgment—Motion to Set aside—Default Judgment—Consent—Mistake—Laches—Estoppel—Rules of Court.

Motion by defendant Barrett to set aside a judgment entered against him.

J. B. Pattulo, for defendant Barrett.

Frank Stacpoole, for plaintiffs.

Henry C. Bleecker, for defendants the Syndicat Lyonnais du Klondike.

CRAIG, J.:—This is a motion made by notice served on 24th October, 1904, on behalf of defendant Barrett, to set aside a judgment entered against him by plaintiffs on 16th February, 1903.

For a proper understanding of this motion and the judgment to be given, a short history of the action is necessary. On 16th May, 1902, the Bank of Commerce instituted an action against the first-named defendants, suing upon a promissory note for $92,500, which was made by the defendant Syndicat to the order of Joseph Barrett, and by him indorsed to the bank as collateral security for a debt then running in the bank against him. This note was given as collateral security to a certain mining mortgage made between the defendants, the Syndicat and Joseph Barrett, to secure the same sum, further secured by a chattel mortgage for the same amount. All these instruments—note and mortgage—were assigned to the bank by Barrett, and upon these the bank sued. Thereupon the defendant Syndicat

counterclaimed against the bank and the defendant Barrett, setting up fraud and deceit on the part of the bank and Barrett in negotiating the sale of the property, which consisted of placer mining claims, and the price for which was the consideration in the note and mortgages. Besides setting up the counterclaim, the defendant Syndicat raised against the note and mortgages a great body of defences of a technical character. The action came on for trial before me on 9th September, 1902, Mr. O. H. Clark, who was solicitor for the Bank of Commerce, being counsel for plaintiffs, and Mr. Stacpoole assisting him; Mr. Bleecker appeared as counsel for the defendants the Syndicat, and up to and until 12th September no one appeared for Mr. Barrett, although he was in Court and summoned as a witness. It now appears that the defendant Barrett never appeared in the action at all upon the main suit on the note and mortgages. He says that he has no recollection of and believes he was not served with the writ. Mr. Stacpoole, one of the solicitors for the plaintiffs, swears now upon this motion that he did serve Barrett personally with the writ long prior to the trial of the cause, but that the solicitors for the bank never formally entered judgment by default against Barrett for non-appearance. In my judgment in that action I found for the bank upon the note and mortgages and dismissed the counterclaim against them for fraud and deceit in the sale, but found for the Syndicat against Barrett upon the counterclaim for deceit, and my judgment in the matter was delivered upon 16th February, 1903. Upon the trial of the action Mr. Pattullo appeared upon 12th September, stating that he appeared on behalf of Barrett, and applied to have the counterclaim against Barrett struck out. It then appeared that Barrett had never been served with the counterclaim, and I then expressed my intention of striking out the counterclaim entirely as against Barrett and dismissing it as against him. After some argument by counsel as to the effect of Barrett continuing in the case and the evidence being heard against him and the effect of Mr. Pattullo's appearance, the matter stood over, Mr. Pattullo being allowed to watch the case for Barrett. The matter was adjourned, and on 18th September I find the following in my notes: "Mr. Pattullo, counsel for Joseph Barrett, appears and asks, as the defendant Barrett has been made a party defendant by counterclaim with his co-defendants, that he appear and be allowed to file a full defence to the said counterclaim,

as it affects the said defendant, and waives want of service or irregularity of service and all formal defences in proceeding, and consents that his client Barrett is now properly before the Court by procedure." Thereupon the trial went on, and Mr. Pattullo, for Barrett, examined and cross-examined witnesses on Barrett's behalf. My judgment given at that time was against the Syndicat only on the note and mortgages, not against Barrett, and against Barrett on the counterclaim for damages for $40,500. After the delivery of that judgment a motion was made for supplementary judgment, and a request that I should direct that an account be taken as between Barrett and the bank as to what was due on Barrett's debt, and that the note and mortgages being only assigned to the bank as collateral security, a certain balance would then be coming to Barrett because the manager for the bank had sworn upon the trial that Barrett's debt only amounted to some $67,000; there would, therefore, on an accounting, speaking roughly, be a balance of over $20,000, coming to Barrett on the original note, which the Syndicat asked to have applied, pro tanto, upon their judgment for damages. This I granted by a supplemental judgment dated on 2nd March, 1903, in which I directed a reference to ascertain the amount due by Barrett to the bank, and that the order of reference be taken out within 10 days. Following this, the solicitors for the bank prepared minutes of judgment, which were approved of by Mr. Pattullo, but when signing judgment those minutes were destroyed, and new minutes prepared by the solicitors for the bank and used upon the signing of the judgment. In the meantime, and without notice to Mr. Pattullo, the solicitors for the bank obtained from me a postscript to my judgment worded as follows: "There will be judgment for the plaintiffs the bank against Barrett, he not defending as against them, for the amount claimed in the writ." The amount claimed in the writ was $92,500, and interest thereon at the rate of 6 per cent. from 22nd June, 1901. This note of mine is not dated, and it appears to have been very hurriedly written after my supplementary judgment. Why I made that note, upon what material or representations, I do not now remember, and Mr. Stacpoole, who was examined upon his affidavit on those words, cannot remember either, he admitting that he was the one who made the application. Certainly something must have been represented to me or I never would have made that note. It was not made at the time

of the original supplemental judgment, and is wholly inconsistent with it. It is true that Barrett appeared upon the trial without formally appearing to the action in a regular way and that he gave evidence, but it is also equally true that there was no trial of the bank's claim against him nor of the balance due to him, and at the time of the trial it was not shewn that Barrett had not appeared to the main action, plaintiff evidently relying on his non-appearance to sign judgment by default. He was certainly liable as indorser upon that note, and judgment might have been obtained against him in default of appearance. That was not done.

Our Rule 88 is as follows: "When any defendant fails to appear to a writ of summons, and the plaintiff is desirous of proceeding upon default of appearance, he shall, before taking out such proceedings upon default, file the writ or an order dispensing with such filing, with an affidavit of service, or a compliance with any order for substitutional service, as the case may." This Rule was not applied. Rule 157 is: "If the plaintiff's claim is only for for a debt or liquidated demand, and the defendant does not within the time allowed for that purpose deliver a defence, the plaintiff may, at the expiration of such time, enter final judgment for the amount claimed, with costs." Nor was judgment signed under this Rule. Formal judgment was entered on 4th March, 1903. By that judgment it was ordered that judgment be taken against the defendants for $92,500, and interest, as before provided, making, in all, $101,204.15, and all the costs of the action, which were afterwards taxed, and which included not only the costs of the action against Barrett but all the costs of the trial against the Syndicat, including any motions and proceedings taken by the Syndicate in which Barrett was not at all involved or concerned. The judgment afterwards proceeds to direct dismissal of the counterclaim against the bank and judgment for the Syndicat against Barrett for $40,500, and then directs the payment into Court by the Syndicat of a sum amounting, in all, to $70,000, and the matter is then referred to the clerk of the Court to ascertain the amount due to the bank by Barrett up to 3rd February, 1902, and further ordering that the balance of the judgment in favour of the bank, over and above the amount so found due from Barrett to the bank, be set off, pro tanto, against the amount of the judgment in favour of the Syndicat against him the said Barrett.

Upon this motion being made before Mr. Justice Dugas, he held the matter over for several reasons: first, he wished

me to hear the motion myself; again, my judgment had been appealed from to the Court en banc, which had reversed me; it was afterwards appealed to the Supreme Court at Ottawa, which reversed the Court en banc, sustaining my judgment with some variations, and from that judgment an appeal was taken to the Privy Council, which on 7th May, 1907, reversed the Supreme Court and restored the judgment of the Court en banc.

Mr. Pattullo in his affidavit on this motion on behalf of the application recites the proceedings, and swears that he obtained a copy of my judgment and supplementary judgment, but that at that time the postscript providing for judgment against Barrett had not been added; these were certified by the clerk as true copies; that he knew of the judgment against the defendant Barrett on the 1st April, 1903; that he did move against the judgment, as there was no object in doing so until the date of this motion, and that he considered he could obtain a correction of the judgment in that respect at any time, as the formal judgment was clearly incorrect, according to the directions of the trial Judge; that on 18th October, 1904, he searched the records of the Court, and he then for the first time brought to the attention of the clerk of the Court the fact that there was a discrepancy between the reasons for judgment and the formal judgment, and then the clerk of the Court produced the supplementary judgment, to which there were added the words which I have mentioned. He says that that amendment was made without notice to him at all. That is not denied. In answer to that, the solicitor for the bank says that Mr. Pattullo did not appear for Barrett in the main action, and always repudiated the fact that he was appearing for him in the main action, and that there was no need to serve him. It was then argued, in reply to that, that he was served with the minutes of the judgment which he settled and approved of, which were intended to be used in signing the formal judgment, and that certainly, if any change was to be made in it, he should have been served again, but that the solicitor for the bank, without notice to him, entirely altered and changed the formal minutes of judgment which they agreed upon, and signed a different judgment; that further orders were made amending the judgment without notice to him. He further swears that in the original minutes submitted to him and draft judgment it was only provided that the plaintiff bank should re-

cover against the Syndicat, and there was no provision for a judgment against Barrett, and that that draft judgment followed the directions contained in the reasons for judgment of Judge Craig; that this draft judgment is now on file, but that all the active parts as originally drafted are stricken out, and that the active part appears on additional pages added without any submission to Barrett or his solicitors.

When this motion was made, the appeal before the Supreme Court of Canada was pending. On 6th May, it appears, the bank and the Syndicat settled the matters as between them by an agreement behind Barrett's back, without notice to him and without notice to his solicitors. This agreement provided for a settlement of all matters between the bank and the Syndicat on the payment of a certain sum. All that is known of the agreement is that an order was made directing the payment out of moneys, that the plaintiffs' suit against the Syndicat is dismissed without costs, and the counterclaim of the Syndicat against the plaintiffs dismissed without costs, and a release is given to the Syndicat for a sum apparently very much less than the total amount which the bank would have been entitled to on the note and mortgages. By the settlement and the order confirming it, it is provided that "neither this order nor the settlement between the Canadian Bank of Commerce and the Syndicat Lyonnais du Klondike shall in any way affect the right or remedies, if any, which the above-named defendant by counterclaim, Joseph Barrett, may have against the above-named defendants the Syndicat Lyonnais du Klondike, or that the Syndicat Lyonnais du Klondike may have against the said defendant Joseph Barrett, nor shall this order affect any rights which either the said Joseph Barrett or the said Syndicat Lyonnais du Klondike may have to appeal the judgment now standing against the said Joseph Barrett in this cause or any rights which either of them may have under the judgment now signed against the Syndicat Lyonnais du Klondike." An attempt is here apparently made to protect the interests of the parties in the appeal then pending, which affects only the judgment of the Syndicat against Barrett for damages, and this order in the final clause says: "The judgment now signed against the Syndicat Lyonnais du Klondike," omitting Barrett's name as one of the defendants against whom the original judgment was signed. While this settlement was pending, Pattullo & Ridley, solicitors

for Barrett, heard that something was going on and wrote a letter to Clark, Wilson, & Stacpoole, solicitors for the bank, as follows, being dated 6th May, 1903: "The Bank of Commerce v. The Syndicat Lyonnais du Klondike. We understand that a settlement is being made in this action between the Bank of Commerce and the Syndicat Lyonnais du Klondike. We don't know the terms of the settlement nor in what way it may affect the position of the defendant Barrett with respect to the bank. We have just heard of the settlement, and our client, as you are aware, resides on Gold Run and cannot be communicated with under 3 or 4 days. We beg to notify you, as solicitors for the Bank of Commerce, on behalf of our client, the defendant Barrett, that we hold the bank responsible for anything done by it prejudicial to his interests."

Notice of appeal from my judgment was given on 1st April, 1903. In October, 1904, before making this motion, Pattullo & Ridley wrote to Clark, Wilson, & Stacpoole, pointing out to them the error they had made in signing this judgment, drawing their attention to the fact of the inconsistency between the reasons for judgment and the judgment itself. Clark, Wilson, & Stacpoole replied: "We cannot see that any mistake has been made in the judgment that was signed herein," nothing more. Again Pattullo & Ridley fully go into the matter by letter of 18th October, and a motion to set aside the judgment is launched on 19th October, 1904, no reply being received to the last letter. In Barrett's affidavit he claims a balance due to him from the bank and from the Syndicat Lyonnais du Klondike upon the note which was the product of the sale to the Syndicat, and has brought an action. To that action both the bank and the Syndicat plead estoppel of the judgment obtained against Barrett. The motion has been pending ever since October, 1904, until this time, for the reason that there was no need to go on with the motion if the result of the appeal to the Privy Council had been adverse to Barrett. Now that the result is in his favour, he naturally looks for an accounting from the bank and the Syndicat for the balance coming to him. Why Barrett did not appear and defend the original action is quite clear now from the affidavits. He says that he was friendly with the bank, and that Mr. Clark, the bank's solicitor, told him to take no notice of the writ, that the bank would protect his interests, but that, as the case developed, as the evidence came out upon the action and

upon the counterclaim, Mr. Clark then advised him to get counsel; that he thereupon retained Mr. Pattullo; that Mr. Clark kept Mr. Barrett quiet by assuring him that the bank would guard his interests; and that, so far as he was concerned, it was purely a friendly matter is quite apparent by Barrett's affidavit, by his conduct, and by the affidavit of Mr. Bleecker, counsel for the Syndicat. Mr. Bleecker swears that Mr. Clark told him that he looked after the defendant Barrett's interests up to the time, 2 or 3 days after the commencement of the trial, when he advised Barrett to call in other attorneys. This is not denied by the bank or their solicitors. The bank, by their counsel, very candidly say: "We have no answer to make to the merits upon this motion, we do not deny that the bank or the Syndicat owe Barrett a large balance, amounting to over $25,000, but we have secured a technical advantage which we propose to hold on to if we can," ignoring entirely the merits and rights of the parties; they argue that the laches of Barrett in not moving sooner is fatal to his motion; further, that this is a matter not for a motion to set aside judgment but for an appeal, and that the appeal should have been taken at the proper time when the original appeal was made on the counterclaim; that Mr. Pattullo, by his appearing in the action, and Mr. Barrett, by his appearing at the trial, waived all irregularities, and that the judgment which I gave supplemental to all my judgments was properly enough given and dispensed with the filing of an affidavit of non-appearance by Barrett; that sufficient evidence was given at the trial to warrant that judgment against Barrett, his indorsement of the note having been proved; that in any event Mr. Pattullo has no right to be heard, nor Barrett to be heard, now, because Mr. Pattullo always contended that he was not Barrett's solicitor in the cause, and that these notices which Barrett's solicitors now complain should have been served on them should not have been served on them because they were not in fact solicitors for Barrett; that the Court now has no jurisdiction to set aside this judgment. They cite as authority the case of Morrison v. Rees, 1 P. R. 25, where it was held that where a defendant has omitted to defend himself against an alleged improper demand, allowing judgment to go by default against him where he had full opportunity of offering his defence to the consideration of the jury, the Court will not interfere unless fraud is shewn; and Bank of Upper Canada v. VanVochis, 2 P. R. 382; McVicar

v. McLaughlin, 16 P. R. 450; Charlton v. Dickey, 49 L. J. Eq. 40.

It is contended on behalf of the defendant Barrett that judgment by default under Rule 88 cannot be signed without the filing of the writ and affidavit of service; that the postscript to my supplementary judgment is nothing more than a permission to sign judgment by default, and is not a judgment after trial, as the words used in it are, "he not defending;" that upon any material now before the Court such an order could not have been made, and was not intended to be made; that it is entirely inconsistent with the other reasons for judgment, and also with the formal judgment; that if the supplementary judgment is worked out as directed this judgment cannot have effect, but that there must be an account taken of the balance due from Barrett to the bank; that the judgment is wholly irregular and that such irregularities cannot be cured but must be set aside; referring to Cash v. Wells, 1 B. & Ad. 375, 35 R. R. 324, where it was held that an application to set aside a judgment as against good faith is ex debito justitiae, and the Court will not impose on the defendant as a condition for setting it aside that he will bring no action; also Watt v. Barnett, 3 Q. B. D. 183, 363; Atwood v. Chichester, 3 Q. B. D. 722; Smith v. Sydney, 5 Q. B. 202; Anlaby v. Prætorius, 22 Q. B. D. 764. This seems to be the leading authority upon this matter, and is conclusive to my mind.

Against these authorities Mr. Stacpooole cites Rutherford v. Bready, 9 Man. L. R. 29; Boyle v. Sacker, 58 L. J. Ch. 141; and Dyson v. Morris, 1 Hare, 58 R. R.

Mr. Bleecker, who appears for the Syndicat, only sets up the ground that they have a settlement with the bank, and by that settlement they lost their right to appeal against the judgment rendered against them at that time; that they now rely upon the judgment which the bank obtained against Barrett; that they intended to appeal against the judgment against them which the bank had obtained, but that the appeal was dropped by reason of the settlement; that in making the settlement the Syndicat were represented by Fernand DeJournel, their attorney, and were induced partly to make the settlement by reason of the judgment against Barrett, as Mr. Bleecker was informed by Mr. DeJournal; that they propose in an action by Barrett against them on the note to plead the estoppel of that judgment

The defendant Syndicat were just as well aware as the bank were of all the reasons for judgment and of the supplementary judgment which gave them a right to set off, pro tanto, the balance coming to Barrett from the bank; that they were aware of the postscript to my judgment which enabled the bank to sign judgment against Barrett, is only shewn by hearsay. They had no interest in knowing that, and why they should I cannot conceive. They were settling their own difficulties with the bank for a very much less sum than they would have paid if the bank had demanded the full sum. Probably the bank were glad to get out of an appeal upon those terms, and, no doubt, the Syndicat considered that as a reasonable consideration for dropping the appeal. Between them they now endeavour to sacrifice Barrett. If this judgment cannot be set aside, and if that judgment which now stands against Barrett can be pleaded against him as an estoppel in his action to recover an amount justly owing to him, a very grave injustice will be done. I do not see upon what grounds either of these parties can justly and fairly contend that Barrett must be sacrificed to enable them to come to a settlement of their differences. The postscript which I added to my judgment was not warranted by the reasons which I gave for the judgment. Why I gave it I cannot now say, neither can Mr. Stacpoole, who was examined for discovery. There are no affidavits on file, and if I erred then, I certainly will not err now so far as my judgment goes, in having that judgment stand, and my order will be that the judgment be set aside, costs to abide the result of the reference provided for in the supplementary reasons for judgment.

YUKON TERRITORY.

CRAIG, J. JUNE 25TH, 1907.

CHAMBERS.

BOWCHER v. CLARK.

Solicitor — Costs — Taxation — Solicitor and Client Costs —Proof of Services — Onus — Necessary Work—Evidence — Report of Taxing Master — Appeal.

Appeal by defendants from the report of the taxing Master under the direction contained in the judgment of

CRAIG, J., 6th August, 1906, which direction was to tax an itemized bill of the services and disbursements referred to in the bill of costs dated 18th July, 1904, exhibit D. in this action.

J. P. Smith, for defendants.

J. A. Clarke, for plaintiffs.

CRAIG, J.:—The facts of the case appear pretty fully in the judgment referred to, but the taxing Master in making his report has gone perhaps more fully into some of them in drawing his conclusion. The counsel for the defendants who makes this motion, appealing from the report, contends that the Master has actually tried the case instead of taxing the bill referred to him, and refers to the bottom of p. 3 and the top of p.4 of his report, in which he says: "I come to the conclusion that this was the only amount that at that time they wished to exact from him. As I have already stated, they were subsequently paid the entire costs of the two proceedings, and received a considerably larger sum than they had proposed charging Bowcher, perhaps at a time when it seemed as if it were difficult, if not impossible, to collect from Bradley." The bill which the defendants rendered to Bowcher of 18th July, 1904, was as follows:—

"To amount of account rendered 27th July, 1903	$520.25
"To disbursements of taking out and filing judgment	18.25
"To subsequent costs	25.00
	$563.50

"Credit.

"Cash deposited by H. E. Bowcher re security for for appeal	$300.00
"Balance.	$263.50"

The bill referred to in this last account, exhibit D., being rendered 28th July, 1903, was as follows:—

"To fee on hearing Bradley v. Bowcher before Gold Commissioner and on appeal and conducting case	$300.00
"Paid in disbursements	220.25."

It will be remembered that this matter arose over an action in the Gold Commissioner's Court, subsequently appealed to the Territorial Court en banc, and that the successful appellant recovered all his party and party costs from the defendants in that action, and that Clark, Wilson, & Stacpoole, the present defendants, recovered and retained all these party and party costs. After all the services had been rendered, but before the party and party costs had been recovered by execution, the defendants Clark et al. rendered this bill which they now claim for. No itemized bill was ever rendered at all until after Bowcher had demanded a return of his money which he had deposited upon the appeal.

Upon the trial what I held or meant to hold was that that if Clark, Wilson, & Stacpoole could prove any items of services rendered by them as solicitors for Bowcher and Sinclair beyond their party and party costs which they were entitled to charge against him as their client, they could collect those items on a taxation. Looking more closely at exhibit D. it says: "Fee on hearing Bradley v. Bowcher and on appeal and conducting case." This is a very meagre statement of what the fees are. It is a lump sum, being exactly the amount deposited on appeal. The disbursements charged in that bill are exactly the disbursements covered by the taxed bills, and which appear in defendants' docket entries, a copy of which docket entries is produced upon the examination before the taxing Master. But in the bill which they now bring in in answer to the judgment the disbursements are not the same at all as in the bill exhibit D; so that, as far as that is concerned, it is not the bill exhibit D. As to the remaining items, they do not correspond with the items in the bill rendered for taxation. In the bill rendered for taxation many of the items are already charged for, as appears by the Master's report in the taxed party and party bills; the others are for consultations, special services, special trips, and investigations, which, to my mind cannot be covered by the item "Fee on hearing before the Gold Commissioner and on appeal and conducting case." None of these items are entered as charges against the plaintiffs in the dockets or in the books of the defendants. What I meant to allow and what I am still willing to allow are any proper fees which the defendants could collect either as counsel or solicitors upon the hearing of the case of Bradley v. Bowcher or upon the appeal. The onus is entirely on the solicitors to prove these items, and, if the only evi-

dence which they can give is the evidence which they have now given, and a copy of which I have read, they certainly must fail as against Bowcher in establishing those items. There are no written instructions in any case. The client positively denies giving any instructions. I have heard no argument on the law as to how far the work done is necessary work which a solicitor might of his own initiative have done in the preparation of the case and be entitled to charge for without special written instructions or admissions of instructions on the part of the plaintiff Bowcher. So far and upon the evidence now given, I could not hold that these items are the ones covered by the bill and items which should be allowed. But if counsel for the defendants thinks he can adduce evidence to shew that these items now charged for were necessary work to be done, and can establish under the facts and the law his right to charge for them and collect, he may have another reference, if he sees fit, upon paying, in any event, the costs of the last one. He must decide forthwith within 5 days whether or not he will adopt this plan. If he does not, then he will be allowed to speak as to the costs on a date to be fixed by me.

YUKON TERRITORY.

CRAIG, J. JULY 17TH, 1907.

CHAMBERS.

BOWCHER v. CLARK.

Costs—Plaintiff Partly Successful in Action—Apportionment of Costs—Reference—Discretion.

CRAIG, J.:—In my judgment on the appeal from the report of the taxing Master I gave leave to have the question of costs mentioned again and argued. In this case the plaintiff is claiming for the return of money deposited as cash security to his bondsmen on an appeal from the Gold Commissioner's Court to this Court, which money he demanded a return of after the costs of the trial and the appeal had been recovered by his solicitors; also for witness fees of himself and witnesses paid by him. In the main action he has succeeded. On the trial, however, he raised, by amendment, the claim that the defendants had undertaken the prosecu-

tion of his actions, with the promise or agreement to recover their costs from the other side. Upon this he failed.

It is contended that no action was necessary, that a taxation was all that was required by order of the Court. It will be remembered, however, that the defendants, during the early stages of the negotiations in this matter, rendered no bill of costs, but simply a little slip of the gross sum, and that the bill of costs finally rendered for reference to the taxing Master was not these bills. The plaintiff, having raised a plea of special retainer, which was the main question tried in the action, should not get his costs of that. All the witnesses in the case were mainly called to prove that plea.

Considering the whole matter and the conduct of the parties on both sides and the contentions raised by them at various times and not sustained upon the hearing, the fairest disposition I can make of the costs in this case will be that there shall be no costs of the trial to either party, but that the plaintiff shall recover his costs of writ and statement of claim, not including the amendment, and the other costs of the reference and judgment, and there will be judgment for the plaintiff for the $200—balance of the money deposited, and $60 for costs of witnesses, being $20, Bowcher, two days, and $40, Adam Fawcett, which were taxed and recovered by the defendants in the party and party costs; in all, $260.

YUKON TERRITORY.

DUGAS, J. JULY 17TH, 1907.

GWILLIM v. DAWSON ELECTRIC LIGHT AND POWER CO.

Evidence—Foreign Commission—Testimony of a Plaintiff on his own Behalf—Absence of Special Circumstances.

Motion by plaintiffs for an order for the issue of a commission for the examination of the plaintiff Gwillim at Vancouver, British Columbia.

J. P. Smith, for plaintiffs.

J. K. Macrae, for defendants.

DUGAS, J.:—The plaintiffs are solicitors, and are suing defendants for professional services rendered as per alleged contract. One of the plaintiffs, Mr. Gwillim, has since left the Territory, and now resides at Vancouver. He wishes to be examined on his own behalf, and for that purpose an application is made by the plaintiffs that a commission be issued to take his evidence at Vancouver. The motion is supported by an affidavit of his co-partner, Mr. Crisp, by which it appears that Mr. Gwillim would prove the contract; that practising alone in Vancouver it would be inconvenient and expensive for him to come to Dawson to give evidence; and that it will be much less expensive to have his evidence taken under a commission at Vancouver.

There is no doubt that a commission might legally be issued at the instance of a plaintiff to have such evidence taken on his behalf, but such a commission should only be granted under very extraordinary circumstances, which I consider do not exist in this case. When such an application is made by a plaintiff himself to examine other witnesses out of the jurisdiction of the Court, the application, even then, is granted with reluctance; but when it is sought to examine the plaintiff himself abroad, the rule is more strictly applied.

In this case the alleged contract was made in the Yukon Territory, whilst all the parties were resident therein. Mr. Gwillim has left since to make his domicile at Vancouver, from which place it is easy to come to Dawson. The fact of his practising alone may put him to some inconvenience in coming here, but being one of the parties plaintiff, having sued here and having thereby chosen this jurisdiction, those inconveniences are not such as can be taken into consideration under the more strict rule applying to his case. They are not sufficient reasons for depriving the defendants of their right to have him present in Court when he gives his testimony on his own behalf.

To refuse a commission in some instances would defeat the ends of justice. To grant it in other instances would have the same effect. It is not the personal inconvenience of a party to a cause which should be considered, but the ends of justice, which can in this case be more fully attained by having Mr. Gwillim present at the trial of the cause.

The application is therefore refused, with costs in any event. I would refer to the cases of Coch v. Alcock, 21

Q. B. D. 178; Ross v. Woodford, [1894] 1 Ch. 42; New v. Burns, 64 L. J. Q. B. 104; and to other cases cited, under the heading of "Rules applied to Parties to Action," in notes to Rule 487 of the Annual Practice.

YUKON TERRITORY.

CRAIG, J. JULY 18TH, 1907.

TRIAL.

THOMPSON v. SPARLING.

Solicitor — Bills of Costs — Money Lent — Account — Contra-account for Services as Physician — Interpleader Issue — Evidence.

An interpleader issue.

C. W. C. Tabor, for plaintiff.

F. G. Crisp, for defendant.

CRAIG, J.:—The interpleader issue was directed under the following circumstances. The defendant Sparling, himself and in partnership with one Lisle, for some time before 1900 and afterwards, acted as solicitor for the plaintiff. On 8th August, 1900, a mortgage was given to secure the sum which the plaintiff then owed the defendant Sparling and his partner Lisle for costs in various law suits, including a sum of $1,000 owing by Thompson to A. G. Smith, another solicitor. This mortgage has not been paid except a sum derived from a chattel mortgage giver by one Shindler to Sparling, based upon an assignment of a judgment in the case of Thompson v. Meikle and Shindler. The two law suits involved in the mortgage are suits 1 and 2 of Thompson v. Meikle and others, in which Thompson obtained judgments, which judgments were assigned by Thompson to Sparling on 20th September, 1905, and on 21st September a chattel mortgage was taken from Shindler to Sparling as collateral to the judgment held against him as one of the defendants in those actions.

By execution issued on the foregoing judgments the sheriff seized and made a sum of money amounting, if I

recollect properly, to about $1,800. Unfortunately in this case I am somewhat hampered by the loss of the exhibits, which cannot be accounted for, not only in the original records filed in Court but some of the exhibits produced at the trial and marked. Thompson, becoming aware of this money being in Court, issued a stop order, claiming it as his, the execution creditor, and, while not denying that he assigned the judgment to Sparling, he does not admit it, and says in his affidavit that he is not aware of any such assignment having been made. Further in the affidavit he states that he rendered professional services to Sparling and his wife, and that he believes that Sparling is indebted to him over and above Sparling's account against him. He further swears that Sparling collected large sums of money on his behalf, being the proceeds of gold dust paid into Court, for which he had never accounted. Upon these affidavits an issue was directed, and this issue is framed as a simple assertion and a denial, and the record consists only of the order of the Judge directing the issue and the bare statement of an assertion and a denial of the property in the money recovered under execution. There are no other pleadings.

A commission was issued to examine the defendant Sparling, and a great quantity of evidence was taken upon a variety of accounts, bills of costs, moneys lent, and services rendered by Sparling and Lisle; and Thompson on the trial set up his contra-account for professional services, insinuating rather than asserting that Sparling had received large sums of money out of Court on his account, for which he had never accounted or properly applied, all this involving complicated issues, both direct and by counterclaim; no pleadings, of course, to direct the Court in any way as to the exact matters in dispute between the parties.

Sparling's evidence is clear-cut and decisive. Thompson's evidence is rather peculiar. While he swears in his affidavit upon the interpleader motion that Sparling is indebted to him rather than he to Sparling, yet when he is examined both for discovery and upon his affidavit he is utterly unable to produce any evidence, details, or figures to confirm his statement. He professes absolute ignorance of all that Sparling was doing, ignorance of the result of the law-suits, so far as the money part of it was concerned and the application of these funds, and yet he swears that he knows that Sparling is indebted to him. When pressed upon

these points his evidence is wholly unsatisfactory. At one time he says this in answer to questions: "Q. What is the amount of your bill? A. I do not know. Q. Approximately? A. Several hundred dollars. Q. $200? A. Oh yes, probably more than that. Q. $400? A. Possibly. Q. More than that? A. I do not know." Further on in the examination he says "Well, it might be between $200 and $5,000, I think." It will be remembered that this examiniation was taken upon his affidavit, and his attention is directed to his affidavit in which he alleges contra-account and liability. But he comes to the examination and gives evidence all the way through in that indefinite and hazy manner. One of the parties is a solicitor; the other is a physician. The evidence of both should be, I presume, of equal weight, unless one can from the manner of the giving of the evidence and the nature of it draw different conclusions. The plaintiff does not convince me that he is sure of what he is saying. On the other hand, Sparling's evidence is backed up by clear-cut statements, vouchers, and detail, which I cannot ignore in weighing the respective values of the evidence given. Thompson's evidence is contradictory. Instances of this might be multiplied; it would be useless to do so. For example he writes a letter to Sparling on 3rd August, 1906, long after his professional services were rendered, in which he admits the liability. He knows of the Shindler chattel mortgage being taken. At one time he denies it, but at another time he admits knowing of it. He assigns the judgment. All of which is evidence to shew that he admitted a liability to Sparling over and above the amount of his counterclaim; otherwise he certainly would have refused to hand over these securities, when, as he himself admits, he was in great need of money at the time.

Reverting, first, to his counterclaim, he sues as follows: "To professional services and medicines rendered to self at various times from 1898 to 1904, $250." He admits that he has no dates and no entries of this charge; that, speaking now, he lumps the whole thing by a guess as much as anything else. Sparling denies absolutely that he rendered him one hour's professional services during that time. The onus is upon the plaintiff, and I must disallow that item. In 1905 he charges, in June, for three attendances, one of $15, $10, and another of $10. He swears to these, and Sparling is not positive as to the dates. He says he did attend him three times during the spring and summer of

1905. I will allow those three items. There are then three charges in July and August of $25 each for an examination of urine. Sparling does not deny those items and does not know what fee should be charged for them. Thompson swears they are fair fees, and those will be allowed. The next and the main item is: "17th August, attendance, confinement of wife, $250, and operation on peritoneum after confinement, $150; in all, $400." Thompson's evidence on this charge is somewhat hazy also. He says, regarding this confinement, that $150 is the minimum charge in the Yukon Territory for a confinement case; but another doctor in Dawson, called as a witness, says that the minimum tariff is $100. The plaintiff says this was a complicated case, that the peritoneum was ruptured, but he afterwards charges $1.50 for an operation on the peritoneum, which, he says, was simply sewing up and was all involved in the one attendance. It was part of the delivery. The plaintiff on cross-examination said it was "a pretty complicated case, not very serious." He didn't impress me with the fact that the case was so serious as to necessitate any very special attendance or special operation. Dr. Catto was called, and says that the stitching of the peritoneum is very common in confinement cases, and in his practice he does not charge anything extra for it, that if there had been an instrumental delivery $150 would be the minimum charge, and that the minimum charge in an ordinary case of confinement is $100 by the Yukon tariff. This doctor also swore that there were a certain number of visits which every doctor paid as a matter of course after confinement which were not charged for, but included in the confinement charge. I think that $250 is a large fee for both these items, and the charge of $150, the second item, will be disallowed. Then follow charges on 18th August, the day following the confinement, and every day on to 31st August. The first 2 days there are 3 visits each day; the next nine days there are 2 visits each day; the next day, one visit; the day following, two visits, and the day following, one visit, and in September, several visits. All these visits are charged at $10 each. The lady was confined at the hospital which Doctor Thompson daily visited, and his visits, according to Mr. Sparling and not seriously denied by himself, consisted simply of looking in at his patient as he passed by. Sparling says in his evidence that there were only 20 visits in all, whereas 43 visits are charged, all at $10 each. It is hard to say what to do

with a case like this. The doctor in his evidence does not convince me that the case was a serious one at all; some slight inflammation of the bladder, about which he was not very definite in his evidence. Of course he would have a better knowledge of the number of visits which he paid to this lady than the husband, who was not present at the time, and I am disposed to alllow the number, but I am not disposed to allow the amount, which I think is more than should have been charged. I am disposed to do this because in the only book produced by the plaintiff shewing his charges he does not carry out the amounts, neither as to the large amount charged for the confinement nor afterwards as to the visits, if my recollection of the exhibit which is lost is correct. I will therefore allow $5 for each of those visits.

It will be seen by adding up the statement of the plaintiff's counterclaim for medical services that the amount he charges for a very ordinary case of confinement is $830. Even on the Yukon tariff, as shewn by both doctors examined, this is a very large bill, and I think not warranted by the case.

As to the defendant Sparling's claim, his bills of costs will be taxed by the taxing Master, except in cases where they have already been taxed as between party and party, when they will be allowed at the sums so taxed. Any extra professional services will be taxed, under the usual rules applying to such matters, by the taxing Master. He will be allowed the services rendered in drawing the chattel mortgage from Shindler, which was a necessary act and a precautionary one in guarding the interests of the plaintiff Thompson. He will also be allowed the loan to Hurdman and the loan secured by a promissory note, both these matters being further proved by vouchers, together with interest at 5 per cent. for both amounts from the date of the loan. Accounts will be taken by the clerk of the Court between the parties, based upon this judgment, and he will ascertain, first, the amount due to Lisle & Sparling at the date of the mortgage, and from that date interest will be allowed at the rate of 6 per cent. He will then ascertain the amount owing to Sparling personally upon a taking of accounts, upon a taxation of the bills of cost for various professional services rendered by him, and upon his report being made I will deal with the question of costs.

I am dealing with this whole matter without pleadings, because counsel for both parties agreed that I should do so, and were desirous that a settlement should be made of the whole matter. But certainly no case in future should be presented in the manner in which this case was; a proper issue should have been drawn up setting out the true controversy so that the Court could have been properly informed of the matters to be tried beween the parties, and not have to pick up, from a whole lot of scattered and lost exhibits, the contentions of the parties.

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MACDONALD, J. AUGUST 7TH, 1907.

TRIAL.

GRAND LODGE OF ANCIENT ORDER OF UNITED WORKMEN v. SUPREME LODGE OF ANCIENT ORDER OF UNITED WORKMEN.

Benevolent Society — Organization — Grand and Subordinate Lodges — Relief Fund — Constitution and Laws — Life Insurance — Use of Name of Society — Publication of Advertisements — Libel — Carrying on Business — Incorporation — Injunction — Counterclaim — Voluntary Payments.

Action by the Grand Lodge of Manitoba and the North-West Territories against the Supreme Lodge, the Provisional Loyal Grand Lodge of Manitoba, Saskatchewan, and Alberta, Loyal Phoenix Lodge No. 7, and different members of the order, Irving, Low, Ellerby, Rogers, Simpson, Grundy, Sandison, Pratt, Jones, Pollard, Rudd, McCallum, and Wien.

The statement of claim set out that the Grand Lodge of Manitoba and the North-West Territories was organized in 1892, and in 1904 received letters patent from the Lieutenant-Governor in council. The individual members above mentioned all resided in Winnipeg, and were on 31st May, 1905, in good standing in the Grand Lodge of Manitoba, and were suspended members but entitled to reinstatement. The Grand Lodge of Manitoba carried on an insurance business, and on 1st May, 1905, had about 5,300 members and 88 branches known as subordinate lodges, estab-

lished by the Grand Lodge. About 15th May, 1905, the Supreme Lodge terminated all fraternal relations with the Grand Lodge of Manitoba, and became antagonistic thereto, and decided to form an association or a Provisional Grand Lodge to be known as the Loyal Grand Lodge of Manitoba, Saskatchewan, and Alberta, and appointed Irving as Provisional Grand Master, and Low as Provisional Grand Recorder, and defendants, it was alleged, wrongfully, by advertisement and otherwise, published matter disparaging the Grand Lodge of Manitoba and impeaching its reputation.

Defendants claimed the right to do the same business in Manitoba and the North-West Territories as the Grand Lodge of Manitoba had been carrying on for 13 years, and were soliciting business of the same kind and endeavouring to deprive the Grand Lodge of the use and benefit of the name of the Ancient Order of United Workmen, and to compete with the Grand Lodge. It was alleged that the defendants had caused the Grand Lodge great loss by their misrepresentations, and the Grand Lodge had lost members and revenue. The Supreme Lodge applied to the Provincial Treasurer of Manitoba for a license under the Manitoba Insurance Act to do business as an insurance society in Manitoba, and the Provincial Treasurer refused such license.

An injunction was asked for restraining the Supreme Lodge and the other defendants from the use of the name "Ancient Order of United Workmen" in Manitoba, and any other name likely to deceive or mislead the public into the belief that the Supreme Lodge or the other defendants or any of them were the same as the Grand Lodge, from issuing or publishing any advertisement, circular, or prospectus disparaging the Grand Lodge or injuring the standing of the same, and from collecting moneys for life insurance from the members, to join in contract with the Supreme Lodge or any of its organizations for life insurance.

The statement of defence filed by the Supreme Lodge sets out that the Ancient Order of United Workmen was established by a member of the working men at Meadville, Pa., in 1868. At the present time it comprised over 320,000 members in the United States and Canada. As the membership of the Order increased, it became inconvenient to entirely govern it by one central body, and a constitution was adopted which divided the Order into subordinate lodges, grand lodges, and a supreme lodge.

In 1882 certain members, persons in Manitoba, desired to become members of the Order, and the country being at that time sparsely settled, the Supreme Lodge, by a charter dated No. 18, 1882, constituted a subordinate lodge of the Supreme Lodge, under the name of Winnipeg Lodge, No. 1, of the A.O.U.W., in the city of Winnipeg, province of Manitoba, Canada.

Thereafter the members of the Lodge mentioned petitioned the Supreme Lodge to be annexed to the Grand Lodge of the State of Minnesota, and in 1883 the Supreme Lodge annexed the subordinate lodge and the territory of Manitoba and the North-West Territories to the Grand Lodge of Minnesota, owing its allegiance to the Supreme Lodge, through the last mentioned Grand Lodge.

In 1884 the Supreme Lodge severed the relations between the Manitoba Lodge and the Grand Lodge of Minnesota, and annexed it to the Grand Lodge of Ontario.

In August, 1892, the Manitoba Lodge petitioned the Supreme Lodge to be constituted a separate Grand Lodge of A.O.U.W. of Manitoba and the North-West Territories, and a charter was granted constituting the same a separate Grand Lodge. In 1904 there were 5,000 members of the Order in Manitoba and the North-West Territories.

In June, 1893, the Grand Lodge was incorporated under the Manitoba Benevolent and Savings Associations Act, 40 Vict. ch. 25, sec. 1.

In 1904 certain officers and others, members of the Manitoba Grand Lodge, formed a scheme to break away from the Order and to set up an independent Order in Manitoba and the North-West Territories, and for that purpose, and without the consent and against the wishes of the Supreme Lodge and other members of the Order, and against the consent of many members of the Order in Manitoba and the North-West Territories, they filed a petition with the Provincial Secretary, praying incorporation.

Subsequently a special session of the Grand Lodge was called, when the majority of those present voted to sever their relations with the Order at large, and to incorporate themselves under the name of the Grand Lodge of A.O.U.W. of Manitoba and the North-West Territories, and in 1904 letters patent were issued incorporating the Grand Lodge, and plaintiffs carried away, appropriated, and took to themselves, all the assets and assumed the name of the Ancient

Order of United Workmen and appropriated to themselves the benefit of the standing of the Order which the Supreme Lodge had, by constant effort during 37 years, worked up to its present high standing. The Supreme Lodge alleged that the letters patent issued to the plaintiffs did not have the effect of incorporating the plaintiffs, because the provisions of the Act were not complied with.

While the Grand Lodge continued their allegiance to the Supreme Lodge they became indebted to the Supreme Lodge in the sum of $39,267.76, payment of the guaranty fund on assessments made by the Supreme Lodge. Two payments were made in 1904, leaving a balance still due of $29,209.71. By levies made by the Grand Lodge, they realized about $17,000, which the Grand Lodge held in trust for the Supreme Lodge at the time of the secession from the Order, and the Supreme Lodge claimed these moneys as due and owing by the Grand Lodge to the Supreme Lodge.

In March, 1905, certain members of the Manitoba Grand Lodge refused to pay over moneys due to the Supreme Lodge, and introduced amendments to the constitution, without submitting them to the Supreme Lodge for approval, and set themselves up as a separate and independent body, and claimed the right to use the name Ancient Order of United Workmen, to the prejudice of the Supreme Lodge.

About the time the plaintiffs, the Grand Lodge of Manitoba, set up or attempted to set up their independent Order, there were about 5,500 members residing in Manitoba and the North-West Territories. The Supreme Lodge denied the incorporation of the plaintiffs, the Grand Lodge, and denied their right to secede from the Order, to use the name Ancient Order of United Workmen, and to use the ritual of the Supreme Lodge, and claimed an injunction against the Grand Lodge, restraining them from using the words "Ancient Order of United Workmen," and from detaining from the Supreme Lodge the sum of $30,288.91, due to the Supreme Lodge, or so much thereof as was collected by the Grand Lodge and retained by them at the time they seceded from the Order.

J. A. M. Aikins, K.C., A. Monkman, and C. P. Fullerton, for plaintiffs.

A. C. Galt and G. D. Minty, for defendants.

MACDONALD, J.:—The Ancient Order of United Workmen as originally constituted was a fraternal, charitable, beneficial, and benevolent society or Order, organized for the promotion of the welfare, social and fraternal, of its members, and the protection of those dependent upon them. Its origin was in the year 1868 at Meadville, Pa.

The first Lodge of the Order was Jefferson Lodge No. 1 of the Ancient Order of United Workmen, to be composed of mechanics and mechanics' helpers, artists and their assistants, of all the various branches. Its objects were to unite all mechanics and mechanics' helpers and those regularly employed in any branch of the mechanical arts, to create and foster a more friendly and co-operative feeling among those who have a common interest, and other equally meritorious objects.

Jefferson Lodge No. 1 constituted itself the Provincial Grand Lodge of the United States, and on 6th October, 1869, the Grand Lodge A.O.U.W. of Pennsylvania was organized at Meadville, Pa. A number of Lodges were thereafter instituted, all subordinate to the Grand Lodge.

The Order having considerably increased, having Lodges in the States of Pennsylvania, Ohio, and Kentucky, was constituted into a national organization in 1873, when the Supreme Lodge was brought into existence at Cincinnati, Ohio, by representatives from each of the three States above named, and in the same year was incorporated by the legislature of the State of Kentucky, the Grand Lodge of Kentucky having been previously incorporated by the same legislature.

In 1886 it was decided that the incorporation of the Supreme Lodge was detrimental to the interests of the Order, and steps were taken to secure the repeal by the legislature of Kentucky of the Act incorporating the Supreme Lodge, and the Order generally recognized the dissolution of the Supreme Lodge as a corporate body. The Supreme Lodge, however, continued as the head of the Order unincorporated.

Grand Lodges were instituted by the Supreme Lodge, the officers of such Grand Lodges being installed by the Supreme Lodge officers or representatives, the Grand Lodge so constituted instituting in their turn subordinate lodges. Thus the Order originated and it rapidly extended.

The question of again incorporating the Supreme Lodge was introduced in 1898, and on 2nd January, 1900, the

Supreme Lodge became a corporation under the laws of the State of Texas under the name and style of the "Supreme Lodge of the Ancient Order of United Workmen."

The first Lodge of the Order in Manitoba was Winnipeg Lodge No. 1, and was instituted under the authority of the defendant Supreme Lodge, and by its accredited representative, on 8th November, 1882, and in 1883 it was resolved by the defendant Supreme Lodge that the Lodges in the province of Manitoba be attached to the grand jurisdiction of Minnesota and Dakota, and on 16th June, 1884, Winnipeg Lodge No. 1, Winnipeg, Manitoba, was transferred to the grand jurisdiction of Minnesota, having up to that date been under the immediate jurisdiction of the defendant Supreme Lodge.

In 1886 Winnipeg Lodge No. 1, with the consent of the Minnesota jurisdiction and of the defendant Supreme Lodge, withdrew from the Minnesota Grand Lodge and became annexed to the jurisdiction of the province of Ontario, the defendant Supreme Lodge reserving to the Manitoba lodges the right to become a grand jurisdiction, whenever its members so desired.

In June, 1892, the defendant Supreme Lodge authorized the formation of the Grand Lodge of Manitoba and the setting of the same apart as a separate beneficiary jurisdiction, provided that 10 or more of the Lodges in Manitoba and the North-West Territories should petition the Supreme Master Workmen therefor; and it was further ordered and provided that each subordinate lodge in the said province and Territories elect one representative and the representatives so elected attend at the city of Winnipeg for the purpose of participating in the formation of the Grand Lodge of Manitoba.

In August, 1892, the plaintiff Grand Lodge was duly instituted at the said city of Winnipeg by a representative of the defendant Supreme Lodge, by whom the officers of the new jurisdiction were installed, assisted by a representative from the Ontario jurisdiction. Thus came into existence the plaintiff Grand Lodge.

A constitution and laws were framed by the plaintiff Grand Lodge, and in 1893 the same were submitted to the defendant Supreme Lodge for approval and approved as submitted, except as follows:

"Form of beneficiary certificate should be changed so as to conform in form and substance to the form of beneficiary certificate provided by the Supreme Lodge."

"The provision, general law 1, sec. 8, paragraph A, p. 87, allowing an affianced wife to be named as a beneficiary, is allowable under the special legislation of Supreme Lodge for benefit of the Canadian provinces."

In June, 1893, the Grand Lodge of Manitoba and the North-West Territories having been instituted in accordance with the action of the session of the defendant Supreme Lodge in 1892, a charter was granted by the latter body, and the plaintiff Grand Lodge launched out as the offspring and subject to the constitution, laws, and regulations of the defendant Supreme Lodge.

The charter has been commented upon by counsel for the plaintiffs and characterized as a worthless piece of paper, and from a commercial standpoint this may be true, but without this charter the Grand Lodge could not have come into existence as the offspring of the defendant Supreme Lodge and would not be recognized as a Lodge of the Ancient Order of United Workmen, nor would its members be entitled to the fraternal recognition and other advantages which a connection with the Supreme Lodge would command.

The constitution, general laws, and rules of order of the plaintiff Grand Lodge (exhibit 39) contains the following introduction:—

"The Ancient Order of United Workmen is a fraternal, charitable, beneficial, and benevolent society or Order, organized for the promotion of the welfare, social and fraternal, of its members and the protection of those dependent upon them."

"The following are declared to be the objects of said society and the constitution and general laws adopted for the transaction of its business and for the government of its members in their relation to each other as such and to said society. These constitutions and general laws, together with the general laws of the Supreme Lodge for the government of Grand Lodges having separate beneficiary jurisdictions constitute the 'Laws of the Order' in this jurisdiction;" and one of the objects is to pledge the members to the payment of a stipulated sum to such beneficiary as a deceased member may have designated while living under such restriction as the laws of the Order may prescribe.

Section 13 of the constitution of the plaintiff Grand Lodge provides that the "Grand Lodge shall enact for its government a constitution and general laws, rules, and regulations, and also a constitution for the government of subordinate Lodges, and alter and amend the same, subject to the approval of the Supreme Lodge or the Supreme Master Workman."

Section 14 provides for the election of representatives to the Supreme Lodge, and there is a provision for an appeal by any member of a Grand Lodge, or any party to an appeal determined by Grand Lodge, to the Supreme Lodge.

The general laws of the Supreme Lodge are also incorporated into and made a part of the constitution of the plaintiff Grand Lodge, and such laws are made to directly govern Grand Lodges having separate beneficiary jurisdictions, and are declared to be in full force and effect in this (plaintiff Grand Lodge) jurisdiction.

These general laws provide for a beneficiary fund as follows:

"In order to provide for the payment of the sum of $2,000 to the beneficiaries of each workman degree member of the Order in good standing, upon the death of such member, a fund is established to be known as the beneficiary fund;" and for the collection and disbursement of the beneficiary fund the following jurisdictions are established: (1) The Supreme Lodge beneficiary jurisdiction, which consists of the subordinate lodgse and individual members of the Order not under the control of any Grand Lodge separate beneficiary jurisdiction; (2) Grand Lodge separate beneficiary jurisdiction, which consists of the Grand Lodges respectively which have been or may be set apart by the Supreme Lodge as separate beneficiary jurisdictions.

Rules are prescribed for the government of Grand Lodges separate beneficiary jurisdictions in the collection, management, and disbursement of the beneficiary fund; and to protect each beneficiary jurisdiction from exigencies by which its death rate would be increased, and assessments in consequence becoming burdensome, a relief fund is provided for (p. 40, exhibit 39), by which every workman degree member of the Order, in good standing, is assessed in each and every year the sum of $1. This fund is raised by each Grand Lodge, and is to remain intact in the hands of the grand receivers of the various Grand Lodges, or in such other

depository as the Grand Lodges may designate, until it is needed by the relief board, when such proportion as may be required shall be forwarded to the Supreme Lodge treasury in a manner specified, and should the amount needed exceed the sum total thus raised, then the excess required should be immediately raised by an assessment and forwarded as other relief funds are forwarded, and whenever such fund is depleted or reduced to a sum less than $1 for each workman degree member, the amount necessary to replenish the fund shal be raised by an assessment made as before. It is further provided that Grand Lodges may raise or replenish their relief fund from their beneficiary or general funds.

This relief fund is the cause of the trouble which has arisen between the plaintiff Grand Lodge and the defendant Supreme Lodge leading to this action.

In 1893, and at the time of incorporation of the plaintiff Grand Lodge, the constitution and general laws of the Ancient Order of United Workmen adopted by the defendant Supreme Lodge in 1887, with amendments down to and including the year 1893, were in force and recognized by the plaintiff Grand Lodge (exhibit 42). This constitution and these general laws provided for the issue of charters to Grand Lodges to adopt laws for their government, reprove and punish their misconduct, prescribe and determine the rights, priviledges, and duties of the members of the society, make assessments for revenue upon the Grand Lodges as may be necessary to defray the expenses of the Grand Lodges, and to promote the general welfare of the Order, and generally do all things which it may deem right and proper for the promotion of the honour, welfare, and perpetuity of the Order.

They also provided for the organization of Grand Lodges as might be determined by the Supreme Lodge, and that Grand Lodges should be known by the name and style of the "Grand Lodge of the Ancient Order of United Workmen of . . . ." and each Grand Lodge is entitled to three representatives to the Supreme Lodge.

Grand Lodges are required to make reports at regular and fixed intervals to the Supreme Lodge.

It is further provided that when a Grand Lodge shall be suspended for any cause, the subordinate lodges under its jurisdiction shall, during such suspension, be under the con-

trol of the Supreme Lodge, and in the event of failure of a Grand or subordinate lodge to make the assessments and forward the same as called for by the Supreme Lodge, the charter of such Grand or subordinate lodge so failing or refusing shall be suspended.

After the incorporation of the defendant Supreme Lodge by the legislature of the State of Texas, the plaintiff Grand Lodge at its session in the city of Winnipeg, in March, 1901, amended its constitution, general laws, and standing regulations, and had the same published, incorporating therein its articles of incorporation, its objects being similar to former constitutions. The form of its beneficiary certificate is expressed to be issued under the authority of the Supreme Lodge.

It provides for the manner of assessments for relief fund under general law 11 of the Supreme Lodge, and that the guaranty fund of the Supreme Lodge shall be paid out of the beneficiary fund, and for the appointment of trustees to whom moneys collected in the guarantee fund shall be paid, such appointment to be made jointly with the board of directors of the Supreme Lodge, and such fund shall be subject to the call of the board of directors of the Supreme Lodge for the payment of death claims only which shall be allowed under the relief law of the Supreme Lodge.

The charter of incorporation of the defendant Supreme Lodge granted by the legislature of the State of Texas provided that the said Supreme Lodge of the Ancient Order of United Workmen shall have the power to organize, continue, and establish Grand and subordinate lodges, with such powers, privileges, and immunities as may be conferred upon them by the laws, rules, and regulations of the Supreme Lodge, and such Grand and subordinate lodges shall be subject to such laws, rules, and regulations as may be enacted by the Supreme Lodge at its stated meetings provided for.

It also provides that all Grand Lodges of the Order then existing, whether corporate or unincorporate, should have the right to accept the privileges and benefits of the Act of incorporation, and the Supreme Lodge shall provide the manner and means necessary for such acceptance and the payment of the beneficiary certificates of the members of such accepting Grand Lodge outstanding at the time of such acceptance. And the payment of the beneficiary certificates of the members of such accepting Grand Lodge outstanding

at the time of such acceptance, as well as those subsequently issued, shall be by the act of such acceptance guaranteed by the Supreme Lodge.

The plaintiff Grand Lodge contends that it never accepted the Act of incorporation, and that the Supreme Lodge did not, therefore, incur any liability for beneficiary certificates issued by the plaintiff Grand Lodge. There is no evidence of any formal acceptance by the latter of the former's Act of incorporation. The same provisions for Supreme Lodge representatives for making assessments for revenue purposes are continued, and the plaintiff Grand Lodge contributed to the guarantee fund of the Supreme Lodge down to the year 1904.

In 1903 a change was made by the defendant Supreme Lodge in its assessment plan by which the calls upon the funds of the plaintiff Grand Lodge were greatly increased, and the latter body refused to be further governed by the defendant Supreme Lodge, and decided against the further use of its funds to pay any claims of the defendant Supreme Lodge, and against the further levying of assessments upon its members for that purpose, resulting in the charter issued by the Supreme Lodge being withdrawn and the plaintiff Grand Lodge being suspended.

The plaintiff Grand Lodge continued doing business as before, and established a number of new lodges. All the subordinate lodges, with the exception of one, became identified with the plaintiff Grand Lodge. Up to this time the plaintiff Grand Lodge had done a large business in fraternal life insurance, and was the only organization in Manitoba or the North-West Territories then carrying on such business and using the words "Ancient Order of United Workmen," and no certificates had, since the institution of the plaintiff Grand Lodge up to 1903, been issued by the defendant Supreme Lodge in Manitoba or the North-West Territories, nor was the latter ever called upon to contribute any financial aid towards the payment of death claims within the plaintiffs' jurisdiction.

In 1905 the defendant Supreme Lodge organized the defendant Provincial Loyal Grand Lodge of the Ancient Order of United Workmen of Manitoba, Saskatchewan, and Alberta, and the latter, under the authority of the former, commenced the business of fraternal life insurance, similar to

that carried on by the plaintiff Grand Lodge at the time and for many years previously.

The defendant Loyal Phœnix Lodge No. 1 of the Ancient Order of United Workmen, is the creation of the defendant Grand Lodge, and is under its immediate jurisdiction, and the individual defendants retained their allegiance to the defendant Supreme Lodge and took an active part in the organization of the defendant Grand Lodge, and were members thereof, and as such were naturally anxious to promote the success of the defendant lodges, and made numerous efforts to add to their ranks, and are charged in the statement of claim herein with libelling the plaintiff Grand Lodge in their zeal to establish the success of their own lodge interests.

The defendant Supreme Lodge have been for many years past and are now carrying on in the United States the business of beneficiary life insurance on a plan similar to that of the plaintiffs, but at different rates, and had in the year 1882 been doing a similar business in Manitoba, but their right to transact this business was transferred by the defendant Supreme Lodge to the Grand Lodge of Minnesota in June, 1884, and by the latter, with the approval and consent of the Supreme Grand Lodge, to the Ontario Grand Lodge in the year 1888.

The Ontario Grand Lodge continued this business until the year 1892, in which year the plaintiff Grand Lodge, with the authority of the defendant Supreme Lodge, was organized in the city of Winnipeg, and created into a separate beneficiary jurisdiction, and in the same year steps were taken towards its incorporation. The plaintiff Grand Lodge then entered actively into the business of beneficiary life insurance, separate and apart from the defendant Supreme Lodge. The defendant Supreme Lodge had ceased doing business in Manitoba and the North-West Territories, after the latter jurisdiction had become subordinate to the Grand Lodge of Minnesota, until the commencement of the trouble leading up to this action. It appears to be the policy of the defendant Supreme Lodge to give absolute control of the beneficiary insurance business to the respective Grand Lodges, but subject to certain payments by such Grand Lodges to the defendant Supreme Lodge towards a guarantee fund or relief fund of the latter body, provided for the purpose of assisting any jurisdiction visited by an unusual cal-

amity causing an excessive death rate, and thus by applying such relief fund relieving the burden of such jurisdiction.

Upon the suspension of the plaintiff Grand Lodge by the defendant Supreme Lodge, and the branching out by the former as an independent body, the latter, with the support of the individual defendants, who remained loyal to the defendant Supreme Lodge, instituted subordinate lodges and a Provisional Loyal Grand Lodge, and again began the business of beneficiary life assurance.

The plaintiff Grand Lodge brings this action to restrain the defendants and each of them, their and each of their officers, agents, and servants, from the use of the name of "Ancient Order of United Workmen," in Manitoba and the North-West Territories, or any other name likely to deceive or mislead the public into the belief that the defendants or any of them, or the business of the defendants or any of them, are the same as the plaintiffs'; (2) from issuing or publishing any advertisement, circular, or prospectus disparaging the plaintiffs or the business of the plaintiffs, or impeaching the credit and reputation of the plaintiffs, or injuring the standing of the plaintiffs or their business; (3) and from carrying on business in the name of the Supreme Lodge of the Ancient Order of United Workmen or other names or any other name liable to be confounded with the plaintiffs' name; (4) and from collecting any moneys for life insurance from the members of the plaintiff Grand Lodge, and from soliciting such members to join or contract with the defendant Supreme Lodge or any of its organizations for life insurance; (5) damages for the loss sustained by the plaintiffs through the defendants.

It is contended on behalf of the defendants that the plaintiff Grand Lodge was not properly incorporated in 1893.

It purported to become incorporated under "An Act to provide for the Incorporation of Charitable, Benevolent, and Savings Associations," 40 Vict. ch. 25, whereas the statute in force in 1893 was ch. 17 of R. S. M. 1892, shortly described as "The Charitable Associations Act."

I do not think, however, that misnaming the Act would affect the incorporation, as the provisions of the Act under which incorporation is sought are fully designated.

The Act provides that "in case of any association which may become incorporated under the provisions hereof being already established under any law of this province, then the

directors or trustees or the office-bearers or committee thereof for the time being may make and sign a declaration of their wish and determination to become incorporated." It is objected that, as the incorporation is purely the creation of statute, the statute must necessarily be strictly followed, and that the application for incorporation of the plaintiff Grand Lodge did not comply with the statute, inasmuch as such application was not made by the office-bearers. I cannot hold that the application was not made as required by the Act. The issue of a certificate by the prothonotary is prima facie evidence of the validity of the proceedings, and the onus of establishing the fact that the incorporation was imperfect and illegal is on the defendants, which onus they have failed to establish.

The evidence clearly satisfies me that the name "Ancient Order of United Workmen" originated with the lodges which afterwards became subordinate to the defendant Supreme Lodge, and that the latter body first established the order in Manitoba and the North-West Territories. It was so established prior to the formation of the plaintiff Grand Lodge, and the Grand Lodge itself was created under the direction, instruction, and supervision of the defendant Supreme Lodge. It is said on the part of the plaintiff that the defendant Supreme Lodge had not the power to issue a charter granting to Lodges the power to use the name "Ancient Order of United Workmen," and, assuming that it had such power, the right to Manitoba was given by Ontario. I cannot see the force of this contention. Manitoba lodges came under the jurisdiction of Ontario with the consent and approval of the defendant Supreme Lodge. The plaintiff Grand Lodge, down to the time of this refusal to be further governed by the Supreme Lodge, recognized its sovereignty and itself as the subject of its creation.

It is admitted that any member of the Grand Lodge, had he so desired, could have made his application to the Supreme Lodge to be admitted a member of the Supreme Lodge beneficiary jurisdiction, and to have his certificate indorsed by way of a guarantee, or he might have applied for admission to any other Grand Lodge jurisdiction, for admission to membership, and to have issued to him a new certificate, so that any member desiring to continue his connection with the Supreme Lodge might have done so. I cannot, therefore, see how it is possible for the plaintiff Grand Lodge

to successfully invoke the assistance of this Court to restrain the defendants from the use of the name "Ancient Order of United Workmen," nor from carrying on or soliciting business in the name of the Supreme Lodge of the Ancient Order of United Workmen, or any of its organizations for life insurance.

The plaintiff Grand Lodge has not, in my opinion, made out any case of libel against the defendants or either of them. There was an honest difference of opinion between the members of the plaintiff Grand Lodge and the defendant Supreme Lodge, and each endeavoured in a reasonably dispassionate manner to present to the members of the Order the superiority of its methods. The articles and language complained of were addressed to the members of the Order, and they only were interested. It is true there was a great falling off in membership in the plaintiff Grand Lodge and the subordinate lodges, but I am unable to find that such falling off was due, or attributable, to the defendants or either of them. I dismiss the action of the plaintiffs with costs.

The defendant Supreme Lodge by their statement of defence set up that while the plaintiff Grand Lodge continued their allegiance, they became indebted to the Supreme Lodge in large sums of money, in assessments levied and collected by the plaintiffs in the manner previously raised and credited to the fund out of which the claim of the defendant Supreme Lodge towards their guarantee fund had in previous years been paid, and they now seek by way of counterclaim to recover these moneys from the plaintiff Grand Lodge. As already stated, this fund had been provided by the plaintiff Grand Lodge from their inception, but from a careful perusal of the mass of evidence adduced, I have come to the conclusion, although with some hesitation, that there was no contractual relationship existing between the plaintiff Grand Lodge and the defendant Supreme Lodge by which the former is under any legal obligation to pay these moneys. The payments made, I think, were purely voluntary on the part of the plaintiff Grand Lodge. No doubt, individual members of the Order, upon becoming identified with it, took obligations to abide by the laws, rules, and regulations of the defendant Supreme Lodge, and the plaintiff Grand Lodge was composed of members who had thus obligated themselves, and, however strong this moral obligation

may have been, I am of the opinion that it has no legal binding effect.

The defendant Supreme Lodge also seeks to restrain the plaintiffs, their members, servants, or agents, from using the words "Ancient Order of United Workmen," or any other words liable to be unfairly confounded therewith.

The plaintiff Grand Lodge was incorporated in the year 1893, with the knowledge and consent of the defendant Supreme Lodge, and beneficiary certificates issued by it and a large amount of insurance effected, a great portion of which is still in force; its power to effect insurance was unrestricted so far as the defendant Supreme Lodge was concerned. The latter incurred no liability under these certificates, and to restrain the plaintiff from the use of the name would be the practical nullifying of the powers created upon it by our provincial laws by a foreign corporation not even licensed to do business in this province.

I am of opinion that the defendants the Supreme Lodge have failed to establish their counterclaim, and I dismiss the same with costs.

MANITOBA.

RICHARDS, J.A. AUGUST 30TH, 1907.

TRIAL.

MANAHAN v. HAMELIN.

Vendor and Purchaser—Contract for Sale of Land—Payment by Instalments—Default—Cancellation—Notice—Remedy by Re-sale—Payment of Taxes—Specific Performance—Laches—Construction of Contract—Election.

Defendant, a farmer residing in St. Rose, in June, 1903, contracted to sell to Robert Colwell two lots in St. Vital. In April, 1906, Colwell assigned the agreement and all his rights to plaintiff. Defendant was to take certain steps to get in the title to the property, which he did not do, but, instead, served a notice of cancellation upon Colwell.

Plaintiff brought this suit for specific performance of the agreement and for an injunction to restrain defendant from reselling or dealing with the lots.

Defendant set up that Colwell made default, and asked the Court to declare the agreement cancelled, and that the action be dismissed with costs.

H. A. Robson and W. M. McLaws, for plaintiff.

E. L. Howell and C. H. Royal, for defendant.

RICHARDS, J.A.:—In June, 1903, the defendant made a typewritten agreement under seal with one Robert Colwell. By that agreement, after reciting that the defendant was the devisee of an undivided two-thirds of certain lands, it was agreed that the defendant should sell the said two-thirds interest to Colwell for $1.750, one-half paid down on the execution of the agreement, and the balance "in 5 equal annual payments of $475, with interest at 6 per cent. per annum, payable yearly upon the whole of the purchase money, or any part remaining unpaid at any time, the first payment of interest at the above rate to become due and be paid a year after the vendor has duly conveyed by a deed in fee simple all his interest in the above named estate."

Colwell then covenanted, by the same instrument, that he would pay "the said sum of money above mentioned, together with the interest thereon, at the rate of 6 per cent. per annum, on the days and times and in the manner above mentioned." He also covenanted to pay all taxes, rates, and assessments that the said lands might be charged with, after that date. The agreement continues: "In consideration whereof the said party of the first part, for himself, his heirs, executors, administrators, and assigns, do covenant, promise, and agree to and with the said party of the second part, his heirs, executors, administrators, and assigns, to covenant and assure or cause to be covenanted and assured to the party of the second part, his heirs or assigns, the above described property by a Torrens title to be issued in the name of the party of the second part, or his heirs, executors, administrators, or assigns, on the execution of a mortgage by said party of the second part under this agreement at the time of the transfer under the Real Property Act of the above mentioned lands." The agreement further provided that "all the expenses of drawing deeds, mortgages, agree-

ment for sale, application under the Real Property Act, searching of title, and all disbursements in connection with the title of the above described land . . . are to be paid and borne by the party of the second part." The defendant, the vendor, further agreed by said instrument to "immediately take the necessary steps in the Surrogate Court to be appointed administrator of the estate of Isabelle Vandal, deceased, and, if necessary, apply to the King's Bench Court for a petition to the estate of Solomon Hamelin and Isabelle Vandal, both deceased." It is evident that the word "petition" was meant to read "partition," in the last clause above mentioned. The agreement provided that Colwell should occupy and enjoy the land until default in payment of purchase money or interest, and further provided that time was to be of the essence of the agreement; and that, unless the payments should be punctually made, "at the time and in the manner above mentioned," the defendant should be at liberty to re-sell the said land.

There is no provision in the agreement for cancellation by notice. The above remedy by re-selling is the only one reserved to the defendant, on the face of the agreement, for use in case of default in the payments.

Colwell transferred his interest in the agreement to the plaintiff. The defendant had derived his right to the two-thirds interest mentioned in the above agreement, under the will of his father, Solomon Hamelin; and his mother, Isabelle Vandal, who was the owner of the other one-third, had died intestate. By Solomon Hamelin's will the defendant's brother, Joseph Hamelin, might, under certain contingencies, have a claim upon the two-thirds interest so devised to the defendant. The provision as to applying for administration to the estate of Isabelle Vandal was made because it was considered necessary by the parties to get control of the entire estate in the land, in order to permit of an application for a title under the Real Property Act; and at the time of making the agreement it was in contemplation of all parties that administration would have to be got before anything could be done with the title to the land. It was also the fact, and known to the parties, that claims of other persons, to certain parts of the lands, had to be disposed of before the defendant could convey a clear title. Those other claims have since been cleared off.

The half of the purchase money, payable at the time of the execution of the agreement, was paid; but no further sums have been paid on the purchase price or interest.

The entire estate in the land was assessed as one item of assessment. The defendant paid the taxes on the whole estate, but did not, either before or after so doing, ask the plaintiff to contribute his proportion.

On 28th May, 1904, Colwell filed an application in the land titles office for a certificate of title to these lands and certain other parcels, not now in question, and, I think, tried, as far as he could, to get the Torrens title issued. The defendant put obstacles in his way and did not act in good faith in connection with this application. A considerable delay occurred in getting administration to the estate of Isabelle Vandal, but letters of administration were finally issued to the defendant on 2nd April, 1906.

The plaintiff tried, a number of times, to get the defendant to close out, or help him to get the matter closed out, but the defendant refused or neglected to do so.

On 3rd April, 1906, being the next day after the issue of the letters of administration to the estate of Isabelle Vandal, the defendant gave Colwell a notice in writing, referring to the agreement, and alleging that Colwell had made default in payment of the moneys due and payable to the defendant under the agreement, and continuing as follows: "Now, therefore, take notice that, pursuant to the covenants and provisoes contained in the said agreement, I hereby require you to deliver up quiet and peaceable possession of the hereinbefore mentioned lands to me, and hereby declare the said agreement to be cancelled, and the same is cancelled, and I shall retain all moneys paid to me under said agreement as and by way of liquidated damages." On 23rd April, 1906, the plaintiff brought this action for specific performance, stating that the plaintiff was ready and willing to perform the agreement, and offering to pay the defendant the balance that might be found due to him, in full.

By his statement of defence the defendant alleged that he had cancelled the agreement before action, by the notice above referred to, and also alleged that Colwell was in arrear on his payments under the agreement, and had not paid the taxes, as by said agreement he had covenanted to pay, but that the defendant had been obliged to pay those taxes,

ment for sale, application under the Real Property Act, searching of title, and all disbursements in connection with the title of the above described land . . . are to be paid and borne by the party of the second part." The defendant, the vendor, further agreed by said instrument to "immediately take the necessary steps in the Surrogate Court to be appointed administrator of the estate of Isabelle Vandal, deceased, and, if necessary, apply to the King's Bench Court for a petition to the estate of Solomon Hamelin and Isabelle Vandal, both deceased." It is evident that the word "petition" was meant to read "partition," in the last clause above mentioned. The agreement provided that Colwell should occupy and enjoy the land until default in payment of purchase money or interest, and further provided that time was to be of the essence of the agreement; and that, unless the payments should be punctually made, "at the time and in the manner above mentioned," the defendant should be at liberty to re-sell the said land.

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By his statement of defence the defendant alleged that he had cancelled the agreement before action, by the notice above referred to, and also alleged that Colwell was in arrear on his payments under the agreement, and had not paid the taxes, as by said agreement he had covenanted to pay, but that the defendant had been obliged to pay those taxes,

and, further, that the plaintiff had not complied with the agreement to pay the costs of drawing deeds, mortgages, agreement for sale, and application under the Real Property Act.

The defendant contends that the plaintiff, not having paid any of the postponed instalments of purchase money, and not having paid the taxes on the two-thirds interest, is in default, and, therefore, unable to ask specific performance by the defendant.

He also contends, in the alternative, that the agreement is vague and incomplete in not providing definitely the times of payment of the postponed instalments of purchase money, and that it, therefore, is not enforceable.

The defendant was interested in, and liable for, the taxes on the third interest not covered by the agreement. As the entire estate in the land was assessed as one interest, neither party could pay his taxes without, at the same time, paying those due by the other. Circumstances, therefore, made it practically necessary for one party to pay the entire tax, and then recover from the other that other's share. As the defendant, though paying the entire tax, made no claim on the plaintiff in respect of the portion payable by the latter, I do not think the plaintiff should be held to be so in default, in respect of the taxes, as to disentitle him to ask for specific performance.

I find that the plaintiff was willing to pay all the costs he had agreed to pay, and did, in fact, by applying for a title under the Real Property Act, pay the same, in part at least.

The question of laches was not pleaded and was not raised at the trial; but, if it had been pleaded and raised, I do not see how the defendant could have succeeded on it, because the action was brought on the 21st day after the issue of the letters of administration, and on the 20th day after receipt of the notice by which defendant purported to cancel the agreement.

I do not find any provision in the agreement enabling the defendant to give such a notice, and I do not think he had any right to do so, without, at least, previously giving notice of his ability and willingness to carry out the agreement on his part, and requiring the plaintiff, or Colwell, to complete within a reasonable time in that behalf. The only remedy reserved to the defendant on the face of the agree-

ment is the right to re-sell; and it is not suggested that the defendant has exercised that right.

I find difficulty in deciding as to the certainty of the agreement. It is very inartistically drawn. But, reading all its clauses together (especially the provision as to the interest), and looking at the condition of the title and the fact that all parties expected considerable delay before the title could be made a good one, I think the intent sufficiently appears that the time for payment of postponed instalments of purchase money and interest was only to be computed from the completion of title by the defendant to the purchaser. If that view is correct, there are no overdue instalments. It is probable that, by some error, the words "principal and" were omitted between "payment of" and "interest at" in drafting, dictating, or engrossing the last clause of the first above stated quotation from the agreement. As the pleadings do not ask a reformation of the agreement, I have no power to insert the above words, though they were, I think, intended. However, without them, but reading all parts of the agreement as it stands, I think it should be construed as above stated.

The plaintiff now offers to take the defendant's title as it stands, and to pay the balance of the purchase money into Court. The defendant can insist on a mortgage for the balance of the purchase money, in the terms of the agreement; but, if he chooses, he may, instead thereof, have the money paid into Court. He also has the right to be re-paid such portions of the taxes paid by him as are properly payable by the plaintiff.

The plaintiff's costs are to be taxed and deducted from $2,375, the still unpaid portion of the purchase money. Such costs are to include those of the reference to the Master. If, within one month from the giving of this judgment, the defendant elects to have the balance (after making such deduction) paid into Court, it is to be so paid. If he does not so elect, such balance is to be made payable in 5 equal consecutive annual instalments, with interest at 6 per cent. per annum, and secured by a mortgage from the plaintiff to the defendant upon the lands. The first of such postponed payments is, in that case, to be made payable one year after the conveyance by the defendant of the land to the plaintiff. Interest is to be computed, from the time of such last named conveyance, on the amounts of principal

from time to time remaining unpaid, and is to be payable at the times of payment of the instalments of principal.

In either case the amount payable by the plaintiff to the defendant, in respect of taxes paid by the latter, is to be paid into Court.

The defendant, upon the payment into Court of the plaintiff's proportion of the taxes, and upon the execution and production of such mortgage, or, if he elects to have the balance of purchase money, less the plaintiff's costs, paid into Court, then, upon the same, and the said proportion of taxes, being so paid, is to convey the lands to the plaintiff, free of all incumbrances.

The defendant's election to have the balance paid into Court, if made, is to be notified in writing by him, or his solicitors, to the plaintiff's solicitors within the month above allowed. If not so notified, it is to be assumed that the defendant does not so elect.

There will be a reference to the Master to tax costs and settle the conveyances and the amount due in respect of taxes, as above, and to do everything else necessary for the carrying into effect of this judgment.

MANITOBA.

MATHERS, J. AUGUST 15TH, 1907.

CHAMBERS.

THEO NOEL CO. v. VITÆ ORE CO.

Evidence—Motion for Injunction—Cross-examination of Deponent on Affidavit—Relevancy of Questions—Advertising —Truth or Falsity of Statements.

Motion by defendants to compel one L. S. Bullen, the plaintiffs' Toronto manager, on the return of a motion for an injunction, to answer certain questions which he refused to answer on his cross-examination on his affidavit filed in support of the motion for an injunction to restrain the defendants from manufacturing, advertising, vending, or disposing of, or trading in, any medicinal preparation under the name of Vitæ Ore, or V.O., or any names resembling the same, or calculated to mislead the public. The questions were directed to the point whether the plaintiffs' preparations, as advertised in certain pamphlets and distributed

among the public, were misrepresented. The defendants endeavoured to shew that the pamphlets and advertising matter distributed by the plaintiffs contained misrepresentations as to their curative property, and also that the preparations, instead of being taken from the earth as advertised, were manufactured from a formula.

J. E. O'Connor and H. Price Blackwood, for defendants.

G. D. Minty, for plaintiffs.

MATHERS, J.:—I am clearly of opinion that the truth or falsity of the advertising matter used by the plaintiffs is relevant to the motion for injunction. The plaintiffs have for more than a year used the pamphlet referred to, and had used it for a long time previously. No correction of the statements contained in it has been sent out, and the plaintiffs are, no doubt, still reaping benefit from its circulation. I think the defendants are entitled to examine as to the truth of the statements made in it or any other advertising matter used by the plaintiffs. An order will go that the witness attend at his own expense and answer the questions refused. Costs of the motion to the defendants in any event of the cause.

MANITOBA.

RICHARDS, J.A. AUGUST 30TH, 1907.

TRIAL.

CALLAWAY v. PLATT.

Limitation of Actions—Real Property Limitation Act—Title by Possession—Evidence to Establish — Corroboration—Husband and Wife—Possession of Husband—Acts of Possession—Leases — Evidence of Possession by Tenants—Issue under Real Property Act—Amendment — Fences—Repairs—Payment of Taxes.

Trial of issue under the Real Property Act.

J. S. Hough, K.C., and H. A. Robson, for plaintiff.

J. A. Machray and R. M. Dennistoun, for defendants.

RICHARDS, J.:—Prior to the getting of title by any of the parties to the action, about 10 acres of lot 57, D. G. S. St. James, lying immediately north of Portage avenue, Winnipeg, was subdivided by a plan, registered as No. 216. The plan shews a street through the centre of this property, called Boyce street. The general course of that street is north and south. On the west side of this Boyce street are 4 lots, numbered 1 to 4, facing on Portage avenue. Then going northerly there comes next a lane, running east and west; and north of that lane are lots 5 to 49, inclusive, facing to the east, on Boyce street, and, to the west, on a street called Minto street. These lots 5 to 49 are those in question in this issue. Then, beginning from the northerly end, the land within the fence, and lying to the east of Boyce street, is subdivided as lots 50 to 88, inclusive. Boyce street has never been opened up for use as a street.

The title to all of this land west of Boyce street, and to all but a few of the lots east of Boyce street, got into Joseph P. Callaway. On 13th January, 1882, Joseph P. Callaway conveyed to Charles H. Dancer lots 5 to 49, being all of the lots between Minto street and Boyce street, lying north of the lane in the rear of lots 1, 2, 3, and 4, fronting on Portage avenue, and these lots 5 to 49 were conveyed by Dancer to Samuel Radcliffe Platt, who lived in England, and who continued, apparently, to live there until the time of his death a year or two ago. There were a dwelling-house and stable on lots 86 to 88. There were no buildings on the other lots.

By deed of 17th January, 1882, Joseph P. Callaway conveyed to the plaintiff, Johanna Boyce Callaway, lots 86, 87, and 88, being the 3 lots next to Portage avenue on the east side of Boyce street. And on 20th March, 1882, Joseph P. Callaway conveyed to Joshua Callaway, who was the husband of Johanna B. Callaway, lots 1 to 4 (being the lots, as above mentioned, between Portage avenue and the lane on the westerly side of Boyce street) and all but 10 of the lots lying east of Boyce street, and in rear of those so conveyed to Johanna B. Callaway.

On the land conveyed to Mrs. Callaway were a dwelling-house and a stable.

Across the middle, or thereabouts, of the 10-acre field so subdivided, there ran a deep slough, with willows on its edge. The area of the slough is in some considerable doubt, as the

evidence varies largely as to that, but it was deep and impassable.

This is an issue directed under the provisions of the Real Property Act, and, after referring to lots 5 to 49, reads as follows: "Whereas Johanna B. Callaway avers and Helen Mary Platt, Henry Platt, and George Spark Clayton deny, that she was on the 24th day of April, A.D. 1906, the owner of the above lots by adverse possession under the provisions of the Real Property Limitations Act, as against the defendants, and it has been ordered by the Referee of this Court that the said question shall be tried by a Judge of this honourable Court . . . therefore let the same be tried accordingly."

In June, 1882, Joshua Callaway and his wife, Johanna B. Callaway, and their family, went to live in the dwelling-house on lots 86 to 88. They resided there until the dwelling-house was burned by a fire in January, 1891. They thereafter resided elsewhere and away from said lot 57, St. James, until the year 1900, when they rebuilt the dwelling-house, and returned to live on the above lots 86 to 88. The defendants are the executors and trustees under the last will and testament of Samuel Radcliffe Platt, to whom, as above mentioned, lots 5 to 49 were conveyed.

In dealing with a case of this kind, it seems to me that a party, asserting a title under the Statute of Limitations, should be required to prove the same most clearly. Although there is no statutory requirement that the evidence of such parties, and of the members of their families, must necessarily be corroborated, I am of opinion that, unless such evidence appears to a Judge to be correct beyond all reasonable question, it would be unsafe to hold that a title by possession has been gained, in the absence of strong additional proof by the evidence of disinterested persons. In the present case it is alleged that the wife, and not the husband, was practically the head of the family, and the person in possession of the dwelling-house, and it is asserted that, beginning with 1882, she took possession of the lands in question, being the lots 5 to 49, and kept such possession as of right, and, in the course of time, acquired a title under the Real Property Limitations Act. It is impossible to discuss the evidence in detail, owing to its length, but I find that, as a fact, Joshua Callaway, himself, was the person in possession as the head of the family, although lots 86 to 88 were vested in his wife. Such acts

as were done upon the lands in question were done quite as much by him as by any member of his family, and those acts are alleged to have been similar to acts upon Boyce street and upon the lots east of Boyce street, the title to which was in Mr. Callaway. It is true that the evidence shews that Mrs. Callaway handled the finances of the family, but that is explained by the fact that her husband was of a spendthrift disposition, and assented to her doing so.

Strong reliance is placed upon the fact that the slough was filled in, the whole way across the enclosed field. It appears that, by permission of Mr. Callaway, livery stable people, and others in Winnipeg, who were anxious to get rid of manure from stables, used, in the winter months, to draw it and place it upon the slough into which it would sink in the spring. This went on for a number of years, probably till about 1888. The evidence seems to shew that Mr. Callaway did, at some time, cultivate some portions of the lots in question, but I am not satisfied that any portion north of the southerly edge of the slough was cultivated prior to 1888 or 1889, and I further find that it has not been proved by independent evidence that, during two years after the fire in 1891, any portion of the lots in question was cultivated. If not, then any cultivation prior to that fire cannot count in the plaintiff's favour, or in that of her husband.

Beginning from 1893, and continuing until about 1903, it is asserted that the whole 10-acre field was, in each year, cultivated and put in crop by tenants of Mrs. Callaway. The evidence appears to shew that sometimes Mrs. Callaway would let to a tenant, and sometimes Mr. Callaway would let to a tenant.

I allowed the leases, so far as produced, to be put in evidence, although they were objected to by the defence, as not being evidence of possession. I think that objection was well taken, and that they are not any evidence of possession taken by the tenants. In one or two of them the property is referred to by metes and bounds; in others it is referred to as "the Callaway homestead," whatever that may mean. On its face I should suppose that it means lots 86 to 88, if it refers to any part of the land within the 10 acres.

Outside of the evidence of the family, as to possession by the tenants, the evidence is very meagre, and fails to shew continued possession during the period said to have been covered by the tenancies. The only outsider whose evidence

corroborated to any considerable extent that of the family was Mr. Sinclair. He gave certain evidence as to ploughing in different years, but he did not state in what way he was able to fix these years in his memory or satisfy me as to the correctness of his memory, and I am unable to look upon his evidence as sufficient corroboration.

Both Mr. and Mrs. Callaway declared distinctly in giving their evidence that he, Mr. Callaway, never had claimed to be in possession of the lands in question. Mr. Callaway owned the greater part of the land on the east side of Boyce street, opposite the lots in question, and all the land lying between those lots and Portage avenue on the south. A quit claim deed from him to Mrs. Callaway was produced, covering lots 5 to 49, and I was asked to allow it to be filed and to allow the issue to be amended, so as to make it clear that Mrs. Callaway, if she herself was not in possession, could claim through her husband's possession, if he had had it. I have doubts whether I have any power to amend an issue directed in this way, but, if I have, I would not do so in this case. No one claiming a title by length of possession is, in my opinion, entitled to any indulgence from the Court.

As I do not think the evidence sufficiently shews the title by possession, in either Mr. or Mrs. Callaway, I have not considered it necessary to decide whether, if the issue did enable Mrs. Callaway to claim through this quit claim deed, she could do so in face of the above evidence. It seems to me that a person who has been in possession of land may distinctly say that he never claimed it as of right, or that he never obtained a title by possession, and that in either of such cases he should be held not to have got such title. I do not think the law forces a title on any unwilling person, or on a person not asserting the right to it. Both Mr. and Mrs. Callaway have said there was no possession by Mr .Callaway; and yet, if any one had such possession as would give him the statutory title, which I think is not the case here, it must have been Mr. Callaway. If he had and refuses to claim by it, I cannot see how, by choosing to say that his wife had it, he makes the possession to have run in her favour. So long as he was the head of the family, that could not be said for her any more than for one of their children, or employees.

It is argued that, although both Mr. and Mrs. Callaway asserted that he never claimed any possession as of right, yet

he did nevertheless acquire a title by possession, and the case of Sanders v. Sanders, 19 Ch. D. 373, is cited in support of this argument. The point there decided seems to me different from the present one. In that case it was held that, if a party has actually acquired a title by length of possession, he does not divest himself of it by thereafter giving such an acknowledgment of the other party's right as would, before the period provided by the statute had run, have operated to prevent the claimant relying in support of his alleged statutory title on any possession had prior to the acknowledgment. It was held that the title, once got, could only be parted with by conveyance. The statements made in the present case are not an acknowledgment of the Platt title, but a disclaimer ab initio of such possession by Mr. Callaway as would be necessary to start the statute running in his favour. For that reason Sanders v. Sanders is not in point.

Documentary evidence is of greater value than verbal in a case like this. On 8th September, 1899, Mrs. Callaway signed an application to bring under the Real Property Act lots 86 to 88. On the application is her sworn affidavit that she has a personal knowledge of the facts set forth in the application, and that they are true in substance and in fact. In the 7th and 8th paragraphs of that application she says that the names and addresses of the occupants and owners of all lands contiguous to said lots 86 to 88 are "persons unknown." About 8 of the lots now in question (Nos. 5 to 12) are immediately across Boyce street from lot 86 and part of 88. If her present contention were correct, she would, at the time of applying for such title, have been herself the statutory owner of lots 5 to 13; yet she then swore that their owners were "persons unknown."

In order apparently to shew that in referring to "contiguous" lands, she had in mind, not the lots now in question, but lands wholly outside of the 10-acre field, she now says that she always believed that the whole field, and not merely lots 86 to 88, had been conveyed to her by Joseph P. Callaway, and that in applying for title, as above, she thought that she was applying for title for the whole field. I do not see how I can sustain that contention.

A good deal of reliance was placed by the plaintiff's council on the fact that the lots in question, as well as the lots which had been deeded to Mrs. Callaway, and those deeded to Mr. Callaway, were all within the fence, which, prior to

any of them becoming owners, had been placed around the whole land covered by plan 216. This is not like the case of a party who, on taking possession, himself puts a fence around the land in question, which latter act, in itself, is an assertion of ownership. It is alleged that the plaintiff kept up the fence and increased the number of strands of wire. A good deal of evidence on that point was given. Holding that questions of that kind must be distinctly proved, I quote the following from the cross-examination of Joshua Callaway:—

"Q. You would not know the repairs that were made to lots 5 to 49? A. There were no repairs made to them. Q. Not at any time? A. No, nothing more than a wire might be broken down and I would then drive a staple in and repair it; that is all."

It was less expensive for the protection of their own property to occasionally repair the fence around the whole 10 acres than it would have been to fence their own, and any repairs made to the part of the fence on lots 5 to 49 would be for that purpose.

A witness named Jaspar testified to repairing the fence, but on his cross-examination it was shewn that his recollection was very faint, and of little value. Documentary evidence rather points to the fact that, practically, nothing was done to the fence untid 1901. In the lease then given by Mrs. Callaway to one Hutton occurs the following: "The lessor is to put the present fence around the said premises in good repair with at least three strands of wire thereon within one month from the date hereof."

The taxes on the lands in question, lots 5 to 49, were all paid by Mr. Platt or his executors. The plaintiff asserts that she thought during all the years that she was paying taxes on them. She also alleges that she supposed, from the time that she went on in 1882, that her deed from Joseph P. Callaway gave her all the land within the fence, that is, all the land covered by the plan. I think that, in view of the circumstances, I ought not to find this belief on her part as a fact.

Mrs. Callaway, in giving her evidence, relied very largely on a document prepared for her by one of her daughters, rather than on her own memory. This, of course, greatly impairs the value of her evidence. It is a peculiar fact that, although the property upon which the house stood was assessed for a number of years to Joshua Callaway, with Mrs.

Callaway's consent, no tax receipts for the years during which they were so assessed, are produced, and it is alleged that they cannot be found. It is also a peculiar fact that none of the leases made by Joshua himself, except one, is produced. There is the further fact that Joshua in his evidence stated, at considerable length, and in such a way that he could not possibly have misunderstood what he was saying, that the family kept a book in which their actions in connection with this property were written down daily, or at least at the end of each week, by his wife or himself. Although an adjournment was granted to enable them to produce this book, the book was not produced.

There will be judgment declaring that on 24th April, 1906, the plaintiff was not the owner of the lands in question under the provisions of the Real Property Limitations Act. There will also be judgment, so far as I have power to deal with the question, that the plaintiff pay the defendants' costs.

It was argued that the defendants had not made out their title absolutely. Without considering whether they have or have not, I do not think it necessary that they should do so. They have produced a title derived through Arthur L. Sifton, the grantor to Joseph P. Callaway, the same person through whom the plaintiff shewed title to her lots. The words "as against the defendants" in the issue, to my mind, are mere surplusage.

MANITOBA.

MATHERS, J. SEPTEMBER 14TH, 1907.

TRIAL.

CHATWIN v. RURAL MUNICIPALITY OF ROSEDALE.

Water and Watercourses—Diversion of Watercourse—Ditches—Injury to Land by Flooding—Liability of Municipality—Damages.

Plaintiff owned the north-east quarter of section 15, township 16, range 15 west. A creek flowed in a natural watercourse through the land mentioned and the lands adjoining;

another creek also flowed in a natural watercourse at a distance of one or two miles westerly from the first mentioned eastern watercourse.

In 1893 the municipality constructed a ditch from the western creek to the eastern creek for the purpose of drainage, and thereby diverted the waters flowing in the western creek into the eastern creek, and the same went over and upon plaintiff's lands, thereby damaging the same, for which plaintiff claimed $800 damages.

The municipality alleged that the flooding was not caused by the construction of the ditch; further, that the ditch was constructed at the request of the owner of the lands previous to Chatwin getting them, and of other settlers and ratepayers on adjoining lands; and the ditch was constructed as a public benefit and under statutory authority.

C. P. Wilson and F. L. Davis, for plaintiff.

A. Haggart, K.C., and J. H. Howden, for defendants.

MATHERS, J.:—I think plaintiff is entitled to a verdict upon the issues raised on the record. He is the owner of land situate in the defendant municipality. A natural watercourse, known as Eden Creek, running in a south-easterly direction, traverses plaintiff's land. Another natural watercourse, called Snake Creek, runs in the same general direction at a distance of upwards of a mile, to the south-west of Eden Creek. Snake Creek ceases to have a defined channel on section 16, a short distance east of the easterly line of section 17, and spreads over a slough, which occupies a considerable portion of the west half of section 16. The southern extremity of this slough extends into section 9, and from this point Snake Creek continues in a defined channel to the south-east.

Before the work complained of, the waters of Snake Creek did not come upon plaintiff's land.

In 1893 the council of the defendant municipality caused to be constructed a ditch known as Ralph ditch, from the road allowance between sections 21 and 16 across the south-west quarter of 21 to Eden Creek, and in order to force the waters of Snake Creek, which arrived at that point through a ditch previously constructed to the south, to flow northerly through the Ralph ditch into Eden Creek, a breakwater was, by authority of the defendants, constructed across the road allowance between sections 16 and 21.

The effect of the Ralph ditch and breakwater was to cause a large portion of the waters of Snake Creek that would otherwise have gone to the south-east to flow northerly into the Eden Creek.

Snake Creek was a much larger creek with a much larger watershed than Eden Creek. For a number of years no damage resulted to the plaintiff, as each time when the water became high the breakwater was carried away and the water took its natural course to the south-east. In 1902 the breakwater, which had been restored, did not break away, and the result was that more water was forced into Eden Creek than it could take care of, the consequence being that it overflowed it banks and flooded the plaintiff's land. His land was again flooded in 1904.

The statement of defence, besides denying the construction of the Ralph ditch, alleges in the alternative that it was constructed at the request of the plaintiff's predecessor in title. It also denies that the waters of Snake Creek were diverted by the said ditch, and sets up the Statute of Limitations.

I cannot find that any of the defences have been established.

As to the damage sustained by the plaintiff, it is somewhat difficult to arrive at an entirely satisfactory conclusion.

After giving the matter the best consideration I can, I fix the amount the plaintiff is entitled to recover at the sum of $100.

There will be judgment for the plaintiff for that amount and costs of suit.

MANITOBA.

MATHERS, J. SEPTEMBER 14th, 1907.

TRIAL.

WINTHROB v. ROBERTS.

Mortgage—Redemption—Dealings between Mortgagor and Mortgagee — Duress—Unfair Bargain—Relief — Estoppel —Terms of Redemption.

Action for redemption. In March, 1899, plaintiff bought from the Canadian Northern Railway Company a quarter

section of land, and went into possession and occupation thereof; he borrowed $100 from defendant and gave him a chattel mortgage, and when defendant subsequently demanded further security, he gave him a conveyance of the quarter section to hold as security. Defendant paid the railway company the balance due them, and procured a patent to himself, and then asserted ownership, and refused to reconvey to plaintiff on payment of the moneys owing, and so this action was brought.

A. Hoggart, K.C., for plaintiff.

C. P. Wilson and E. F. Haffner, for defendant.

MATHERS, J.:—The plaintiff about 1893 had squatted on the south-east quarter of 15-19-15, west, in Manitoba, which then belonged to the Canadian Northern Railway Company. He afterwards in 1899 applied to purchase the land at $3 per acre, and his application was accepted, but no part of the purchase money was paid. Although it is said the company would not bind themselves to sell until the first payment was made, the correspondence put in evidence shews clearly that the company did recognize the plaintiff as the purchaser. On 8th June, 1901, the company's land commissioner wrote the plaintiff, in reply to his letter applying to purchase the adjoining quarter section: "I have your letter of the 31st May, and in reply have to say that I am a little surprised at you not being able to make your payment on *your land,* but, *inasmuch* as you have made certain improvements and are living on it, I will wait for your payment until the fall, that is on the south-east quarter, but cannot sell you any more land there until you pay up what you have got. * * * I like to protect an actual settler in every case, but I think it unwise for you to undertake to hold more land than you are able to pay for."

In 1898 the plaintiff had borrowed $100 from the defendant upon the security of a chattel mortgage upon some stock. The mortgage having fallen into arrears, the defendant in May, 1901, sent a bailiff to foreclose it.

The plaintiff then came to see the defendant and told him that he had no money and that the seizure of his stock would hamper him in his farming operations. The further conversation as related by the defendant is as follows:—

"Q. You suggested that he should get you better security? A. I asked for more security if I carried it over.

"Q. What security did you ask for? A. I asked if he owned the land.

"Q. And what did he say? A. He said that he bought it from the railroad company.

"Q. What further did you ask? A. I asked him to give me security on it.

"Q. What kind of security? A. Well, seeing that he hadn't the deed, the only security that was suggested was a quit claim deed.

"Q. A quit claim deed suggested itself to you as a proper security? A. I should imagine so, of course.

"Q. You then drew a quit claim deed? A. Yes, or had it drawn.

"Q. You won't pretend to say that Winthrob was giving you absolutely his farm? A. No.

"Q. It was only as security for that loan which was in arrears? A. Yes, of course, that is what I imagined at the time."

A quit claim deed was then executed by the plaintiff, dated 25th May, 1901, for an expressed consideration of $132. This sum probably represented the amount then claimed by the defendant from the plaintiff, but for some reason, to me not apparent, the defendant's solicitors refused to allow his client to explain how that sum was arrived at.

The defendant now applied to the railway company to be substituted for the plaintiff as purchaser of the land in question, and the company replied that upon the production of a quit claim deed from plaintiff this could be done. The defendant forwarded one copy of the deed to the railway company, and was duly entered as purchaser as of the date of plaintiff's application to purchase in 1899. The defendant made payments from time to time, and finally on 4th February, 1903, paid the railway company in full. Before making the final payment he applied for a reduction in the price, but the company's land commissioner refused, pointing out to him that by producing a quit claim deed from Winthrob he got the land $1 per acre cheaper than he could have otherwise bought it. The total amount paid by defendant was $605.51, of which $333.66 was paid on 4th February, 1903.

It was argued that the defendant purchased the land from the railway company on his own account, but it does not seem

to me that he is entitled to take that position as against the plaintiff, even if the facts shewed that he assumed to purchase on his own account. I can see no evidence, however, that he even pretended to do so. He had himself substituted as purchaser in the books of the company in order to perfect his security on the land, and he made the payments from time to time to protect the security.

Prior to making the last payment the plaintiff, at the instigation of the defendant, had applied for a loan of $1,000 to the Colonial and United States Mortgage Company, for the purpose of paying the defendant off, and the loan was accepted at $900. The defendant stated that the amount due him was $930, and that the costs of the loan would be $25, and to make up this deficit of $55 the plaintiff paid that sum to Mr. Davis, who was acting as solicitor for both the defendant and the loan company. The plaintiff gave the defendant an order on the loan company for the whole proceeds of the loan, and when paid the land was to be conveyed by the defendant to the plaintiff's wife. It was argued that this transaction was a sale from the defendant to the plaintiff's wife, but I cannot accept that view. As the land stood absolutely in the name of the defendant, the parties probably treated it as in form a re-sale by the defendant to the plaintiff's wife, but in substance it was nothing more than an arrangement to redeem the defendant's claim as mortgagee of the land. The mortgage to the loan company was executed on 31st January, 1903, and registered on 6th February, 1903. I have no doubt that it was for the purpose of obtaining the title to enable this loan to go through that the defendant then finally paid the balance of $336.66 due the railway company. The loan was delayed for several months waiting for the patent from the Crown, and when it did arrive the defendant demanded a further sum to cover interest on his claim of $935 in the meantime. The additional sum was not paid, and a short time afterwards the defendant drove out to the plaintiff's farm and told him that if he wanted the farm he would now have to pay $2,000 for it. On the 9th November, 1903 the plaintiff went to the defendant's office and received from him a letter written by the defendant and addressed to Mrs. J. T. Winthrob, offering to sell the farm to her upon certain conditions for $2,000, and the defendant at the same time procured the plaintiff to sign a letter agreeing to leave the place and all his improvements

if the option to purchase was not exercised before 1st November, 1904.

This action is brought to redeem, upon payment of the amount of the original loan, interest, and costs, and the amount paid the Canadian Northern Railway Company, interest, and expenses, less any amounts received by the defendant for portions of the land sold.

The defence is that the defendant purchased from the railway company on his own account when he discovered that the plaintiff had no binding agreement, and that in any event the plaintiff was estopped by the letters last referred to from asserting title as against the defendant. I have no hesitation in holding that the defendant did not originally purchase from the railway company on his own account, but that all he did was done in the character of mortgagee, and that that relationship existed between them at least until the letters above referred to were executed. The question is, was that relationship altered by the execution of these documents.

When they were signed, the plaintiff was informed by the defendant that he must do so or leave the place. The transaction on its face was most unfair and extortionate, and such a one that no man of ordinary intelligence would enter into it except under circumstances of extreme duress or necessity. The plaintiff was in distressed circumstances financially, and was no match for the defendant in a business transaction. The land had greatly increased in value, and, according to the defendant himself, was then worth $3,000. Courts view transactions between mortgagor and mortgagee with considerable jealousy, and will set aside the sale of the equity of redemption where, by the influence of his position, the mortgagee has purchased for less than others would have given, and where there are circumstances of misconduct in obtaining the purchase. The principle upon which Courts act is not that the mortgagor is unable to enter into a contract of sale to the mortgagee, but that the transaction ought to be looked at with jealousy, especially when the mortgagor is a needy man and when there is pressure and inequality of position and the sale has been at an undervalue. The above statement of the law is made by Sir John Stuart, V.-C., in Ford v. Olden, L. R. 3 Eq. 463.

Even if the transaction between the plaintiff and defendant be in form sufficient to deprive the plaintiff of his right to redeem, a question upon which I entertain con-

siderable doubt, it cannot, because of its unfair and oppressive character, be given effect to.

There will be judgment declaring the defendant a mortgagee of the lands in question, and referring it to the Master to take an account of the amount due the defendant upon the original loan for principal, interest, and costs, and of the sums paid the Canadian Northern Railway Company and interest thereon, and of any other moneys properly paid in the preservation of the estate for taxes and otherwise, and of all sums received for portions of the lands sold, and to fix a time for payment according to the usual practice, and for a reconveyance by the defendant.

As the defendant resisted redemption, he must pay the costs of suit up to and including the trial—fiat for taxation of costs of examination.

Further directions and costs of reference reserved.

MANITOBA.

MATHERS, J. SEPTEMBER 14th, 1907.

TRIAL.

CAMPBELL v. IMPERIAL LOAN CO.

Limitation of Actions—Real Property Limitations Act—Mortgage—Sale by Mortgagees under Power—Action by Mortgagor to Redeem—Possession—Legal Estate—Notice of Sale.

Action for redemption.

On 26th February, 1890, one Danial P. McLaurin mortgaged in fee sections 17 and 31 and the north-west quarter of 33 in township 15, range 22 west, in Manitoba, to the Imperial Loan and Investment Company of Canada Limited, the defendant company's predecessors in title, to secure the repayment of a loan of $1,250 and interest at 8 per cent., payable annually. The principal was made repayable in three equal annual instalments, the first payment of principal and interest to be made on 1st January, 1891. A payment of $84.80 was made on account of interest in September, 1891, but no further or other payment was ever made by the mortgagor or the plaintiff, either upon the mortgage, or for taxes.

There is no dispute that the mortgage became in default on 1st January, 1892.

On 22nd December, 1894, McLaurin by quit claim deed conveyed the lands to the plaintiff.

The north-west quarter of 33 was sold for taxes and not redeemed, and no claim is now made in respect of that piece of land. The company paid the taxes on the other portions of the mortgaged lands.

On 12th November, 1896, the company, by their agent, one Kirchoffer, agreed to sell the west half of section 17 to Robert Michael and David H. Watson, and on 5th March, 1897, a similar agreement was made as to the east half of the same section with David H. Watson. These agreements were not carried out, and on 22nd December, 1899, an agreement was made for the sale of the whole of section 17 to the defendant John Morton.

On 1st June, 1901, the company made an agreement for the sale of the south half of 31 to the defendant Murachy, and on 5th January, 1903, the company sold the north half of section 31 to the defendant Hodgkinson, who, on 19th January of the same year, assigned his agreement to the defendant Clausing.

The plaintiff brought this action to redeem sections 17 and 31 from the mortgage as against both the company and the purchasers.

A. J. Andrews and H. A. Burbridge, for plaintiff.

J. A. M. Aikins, K.C., A. Haggart, K.C., G. R. Coldwell, K.C., J. F. Kilgour, and A. Sullivan, for defendants.

MATHERS, J.:—The Real Property Limitations Act, R. S. M. 1902 ch. 100, is relied upon by the defendants as a bar to the plaintiff's action. Section 20 of that Act provides that "when a mortgagee has obtained the possession . . . of any land . . . comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage but within 10 years next after the time at which the mortgagee obtained such possession . . . unless in the meantime an acknowledgment in writing of the title of mortgagor, or of his right to redemption, has been given to the mortgagor, or some person claiming his estate, or to the agent of such

mortgagor or person, signed by the mortgagee or person claiming through him," etc.

There is no pretence that the mortgagee was at any time in actual possession of the land sought to be redeemed or any part of it. It is, however, contended that, as the company had the legal estate, and by the terms of the motgage the mortgagor's right to possession ceased upon default, from that time possession would be attributed to the company, and the statute would begin to run as against the mortgagor as soon as default took place. In support of this proposition three principal cases were relied upon, viz.: Delaney v. Canadian Pacific R. W. Co., 21 O. R. 11; Buckman v. Stewart, 11 Man. L. R. 625; and Rutherford v. Mitchell, 15 Man. L. R. 390. It does not seem to me that either the Delaney or the Buckman case supports the proposition argued. All that either of these cases decides is, that the statute does not begin to run as against the mortgagee until some person adverse to the mortgagee has taken actual possession of the land. They leave entirely untouched the question of whether or not the statute does begin to run against the mortgagor before the the mortgagee has obtained actual possession. Rutherford v. Mitchell is, however, an authority directly against the plaintiff, and the rule is this: "Whenever there is a decision of a Court of concurrent jurisdiction, the other Courts will adopt that as the basis of their decision, provided it can be appealed from. If it cannot be appealed from, then they will exercise their own judgment:" per Pollock, C.B., in Leech v. North Staffordshire R. W. Co., 29 L.J.M.C. 155. And again: "It was the custom of each of the Courts in Westminster Hall to hold itself bound by a previous decision of itself or of a Court of co-ordinate jurisdiction:" per Brett, M.R., in The Vera Cruz, 9 P.D. 98.

Following the decision in Rutherford v. Mitchell, I hold that the Real Property Limitations Act is a bar to the plaintiff's right to recover, although I am not prepared to say that I would not otherwise have arrived at a different conclusion.

In September, 1903, the company's solicitors caused to be posted up on the lands a notice of exercising the power of sale contained in the mortgage. It was argued that this was "an acknowledgment in writing of the title of the mortgagor or of his right to redemption" within the meaning of the statute. If Rutherford v. Mitchell was well decided, the title of the plaintiff was extinct at the time the notice was posted

up, and Shaw v. Coulter, 11 O.L.R. 630, 5 O.W.R. 305, 6 O.W.R. 55, decides that the service of a notice of exercising the power of sale under such circumstances would not have the effect of reviving the plaintiff's title.

There were a number of other very important questions argued before me, but, in view of what I have said as to the defence of the Limitations Act, it would be useless for me to express an opinion upon them.

The action will be dismissed with costs.

BRITISH COLUMBIA.

(VICTORIA.)

JULY 18th, 1907.

FULL COURT.

LETT v. LYE.

Contract—Payment for Information as to Timber Limits—Condition Precedent—Cancellation of Previous Contract—Defendant Putting it out of Plaintiff's Power to Perform Condition — Right to Payment — Reduction in Amount—Deficiency in Acreage—Evidence—Counsel in Witness Box.

Appeal by defendant from judgment of MORRISON, J., in favour of plaintiff, in an action to recover payment under a contract for information as to timber limits supplied to defendant.

One Grose, a timber cruiser, came to Vancouver with information as to where a body of timber lay, which he gave to Ross & Shaw, real estate agents. They re-listed it with the plaintiff, who found a purchaser in the defendant, and the latter entered into an agreement with Grose, which agreement, after investigation, he was not willing to carry out. Plaintiff then represented that he had full control of the information supplied by Grose, and offered to sell to defendant for about half the price which had been agreed upon between him and Grose. One of the conditions of the second agree-

ment was that the first should be delivered up cancelled. Both agreements stipulated for timber lands amounting to between 7,000 and 9,000 acres. Defendant obtained only 8 licenses, or some 5,000 acres, and plaintiff never produced the agreement which Grose cancelled. Defendant therefore resisted payment on these two grounds, viz., lack of area and failure to deliver up the agreement.

MORRISON, J., gave judgment for plaintiff for the full amount, and defendant appealed.

The appeal was heard by IRVING, MARTIN, and CLEMENT, JJ.

J. Martin, K.C., and Baxter, for defendant.

John B. Mills, K.C., for plaintiff.

IRVING, J.:—Having regard to the whole scope and nature of the transaction, plaintiff was to produce to defendant the cancelled document within a reasonable time, that is, before defendant committed himself in such a way, either by taking out a license or staking the land in question, as would make him liable to Grose as a purchaser under the Grose option.

The performance of this act was intended to be a condition precedent.

In White v. Beeton, 7 H. & N. 49, Bramwell, B., points out that the performance of an act may be at one time a condition precedent and at another time not. He gives a number of instances.

In Ellen v. Topp, 6 Ex. 441, it is said that the construction of an instrument (in this respect) may be varied by matter ex post facto, and that which is a condition precedent when the deed is executed may cease to be so by the subsequent conduct of the covenantee in accepting less.

In this case defendant, without waiting for the production of the cancelled deed, proceeded to take out some 8 licenses. He obtained a substantial benefit under the contract, and then set up as an excuse for not paying plaintiff that he (defendant) had not complied with the condition precedent. Grose, who had heard that defendant had obtained the licenses, was pressing plaintiff's partner for payment.

In this state of affairs defendant went behind plaintiff's back and got from Grose an assignment of the document

which plaintiff was to deliver up to him cancelled. By this means he prevented plaintiff from obtaining the document.

In my opinion, after the licenses were granted, at any rate after the purchase by defendant of the document from Grose, the production of the cancelled document ceased to be a condition precedent, and therefore plaintiff can maintain this action.

Mr. Martin argued that there ought to be a proportionate reduction, as defendant only took out 8 licenses. This argument can only be supported on the assumption that all the areas are of equal value; but the value of the information which plaintiff was selling may turn on some question other than the number of acres. Defendant examined the property and determined to take it at plaintiff's figure. His remedy for the shortage is by proving damages.

To get the Grose option out of the way defendant paid the sum of $350, and took an assignment of Grose's rights thereunder to one Thomas. If the defendant now surrenders this option and the assignment to the plaintiff, in order that he may have it cancelled, the plaintiff's judgment should be reduced to $350, but otherwise the judgment should stand.

The form of the judgment was not discussed. In my opinion, judgment should have been for a sum certain, in money, not for a portion in money and balance by note.

The defendant having failed except as to the contingent reduction of $350, I think the plaintiff is entitled to his costs of this appeal.

MARTIN, J.:—Though the matters in question have got into a somewhat confused state, yet, after reading all the appeal book, since the argument, I think not much real difficulty will be found in deciding them.

First as to the amount of timber. A good deal of evidence was given on the point, and it is very uncertain, but I cannot see, on the proper reading of the agreement of 16th February, that we are called upon to actually decide it, because, seeing that the defendant took steps to procure the licenses after he had ascertained from his own surveyor the exact area, it is too late for him to raise the objection. The plaintiff by said agreement did "transfer to the party of the second part (defendant) the right to secure special licenses to cut and carry away said timber;" and later it was provided: "The said party of the second part to stake or cause to be

staked, at his own expense, as many of the said claims near Powell lake as he may wish for the above mentioned sum."

With an actual or presumed knowledge of the circumstances, he took out 8 licenses, and I cannot see how any question of proportionate abatement of the consideration can properly arise; he had the matter in his own hands, and has no valid ground of complaint in this respect.

Then, second, as to the original agreement of 20th January, and its effect on the latter one just referred to. These two agreements were between different parties (Grose and Lye in one case, and plaintiff and Lye in the other), and it has not been explained to my satisfaction why the plaintiff did not before the commencement of this action procure the cancellation of the earlier one pursuant to his undertaking in his letter of 17th February, which the defendant very properly required to safeguard him. That agreement clearly contemplated as between business men, and in apt business language, that before the defendant should be called upon to actually pay over, the plaintiff on his part should be ready with the release; the two things were to be done at the same time, viz., the interchange of the release and the payment of the money. Here there is a condition precedent to the right to recover which the plaintiff had not performed at the time the writ was issued. But it appears that on 22nd October, 1906, a few days before the writ issued (on the 26th of the month), the defendant in fact, though in the name of his son-in-law, and for a consideration of $350, took an assignment of Grose's interest in the agreement of 20th January, thereby putting it out of the power of the plaintiff to obtain the release. I do not think that any blame, in the peculiar circumstances, can be attached to the defendant for taking this step; he in fact was practically forced into doing it, as a precautionary measure to protect himself because of the improper stand taken by the plaintiff. Nevertheless, the result is that he himself has placed it beyond the power of the plaintiff to perform the very condition he relies upon as a defence, and therefore that defence cannot in equity prevail, but at the same time the plaintiff, as a matter of equity, should allow the defendant the sum he so paid Grose, as well as the $120 already paid, and judgment should be entered accordingly, the present judgment being consequently set aside and the appeal allowed to that extent.

I think it opportune to note that I observe that objection was taken at the trial to the defendant's counsel offering himself as a witness. Though it is true, as the trial Judge ruled, that counsel has the strict right to do so, yet this Court has had occasion to remark upon the extreme undesirability of that course being adopted where it can possibly be avoided, and I refer in this relation to the remarks of Chief Justice Ritchie, cited on p. 481 of the case of Davis v. Canada Farmers Mutual Insce. Co., 39 U.C.R. 452, in which case, however, the Court remarked (p. 282) that "without doubt the necessity for their [counsel] being witnesses was sprung upon them at the trial."

CLEMENT, J.:—Had defendant maintained the position taken by him a few days before the writ issued, namely, that plaintiff should, before calling upon defendant for payment, settle with Grose, and so get rid of any question of liability on defendant's part to Grose, it is possible that we should have to hold the plaintiff's action premature; but it seems to me that defendant himself solved the difficulty by buying up Grose's claim. In all fairness, therefore, he should be allowed the sum paid to Grose ($350), and I understand Mr. Mills, upon the argument before us, to consent to this reduction. At the same time defendant's position throughout has been that another and not he had bought up Grose's claim, and I do not think he can with any reason claim that this reduction should affect the question of the costs of this appeal.

As to the alleged shortage in the acreage of timber, there is absolutely no merit in the position now taken by defendant. At the date of the agreement sued on he know as well as, if not better than, plaintiff the acreage of the "body of timber." A type-written copy of the earlier (Grose) agreement was altered and utilized for the second agreement, and I am disposed to think that the absolute covenant as to acreage was left unerased by mistake. But, however that be, the defendant sets up not a breach of this covenant, but misrepresentation as his ground of counterclaim, and on this ground I think he fails; and there being, as I have said, no merit whatever in the position he now seeks to take upon this branch of the case, he should not at this stage have leave to amend.

Plaintiff consenting to reduce judgment by $350, appeal dismissed with costs.

BRITISH COLUMBIA.

(VANCOUVER.)

MORRISON, J. JULY 18th, 1907.

TRIAL.

CHINESE EMPIRE REFORM ASSOCIATION v. CHINESE DAILY NEWSPAPER PUBLISHING CO.

Company—Benevolent Society—Incorporation under Benevolent Societies Act—Non-trading Corporation—Libel—Action by Company Maintainable without Proof of Special Damage

Question of law raised upon the pleadings.

The plaintiffs were incorporated under the Benevolent Societies Act, R. S. B. C. ch. 13, for the purpose, among others, of educating and benefiting the Chinese people in British Columbia. The defendants had their head office in the city of Vancouver, carrying on the business of a newspaper called the "Wa Ying Yat Po," printed in the Chinese language and circulating amongst the Chinese throughout British Columbia. The other defendants were the editor and managing director respectively of the paper.

The issue of this paper appearing on the 21st March, 1907, and other days in that month, contained an article published in the Chinese language, purporting to be signed by a number of Chinamen, members of the plaintiff association. It was alleged that this article was libellous, and that the names were fraudulently attached thereto. Damages were sought in respect to the alleged libel contained in this article so published and circulated.

The question was whether the action was maintainable.

Paragraph 12 of the statement of defence was as follows:—

"The defendants will object that the statement of claim does not disclose any cause of action, and that the plaintiffs, being a corporation incorporated under the Benevolent Societies Act of British Columbia, for the objects and purposes specified in the said Act, cannot sue in their corporate capacity in respect of the words mentioned and referred to in the said

4th and 5th paragraphs of the said statement of claim, with the meaning or meanings or in the sense alleged. The defendants will further object that the said words were not actionable without proof of special damage, and none is alleged."

Sir C. H. Tupper, K.C., and H. W. C. Boak, for defendants.

E. P. Davis, K.C., for plaintiffs.

MORRISON, J.:—It is contended in support of the defendants' point that special damage in a case of this kind must be alleged and proved by the plaintiffs, inasmuch as the corporation is one created under the Benevolent Societies Act, and is a non-trading company, and that the principle applicable to the case of a trading corporation being libelled in the way of their business or trade, is not applicable in the case of a non-trading or so-called benevolent corporation. Several cases were cited in the attempt to support that contention, viz.: South Hetton, etc., Co. v. North Eastern News Association, [1894] 1 Q. B. 133, 63 L. J. Q. B. 293; Mayor of Manchester v. Williams, 60 L. J. Q. B. 23; White v. Mellen, 64 L. J. Ch. 308; Cox v. Feeney, 4 F. & F. 13.

In my opinion, no such differentiation is drawn in these cases between trading and non-trading corporations. A non-trading corporation have the right to acquire property which may be the source of income or revenue. And the transaction of the business incidental thereto creates a reputation, rights and interests, in no essential respects different from those of an individual or a trading corporation. They may be enhanced or destroyed. Counsel for the defence would have the principle enunciated in those cases confined to instances where the corporation were injured in the way of their business or trade, using the words synonymously. But I do not read into those learned judgments that limitation. For a trading corporation may be injured as to their property without being injured as to their trade, and vice versa. True, if a trading corporation are injured in the way of their business, in the sense that their profit or dividend-making power is crippled, they may maintain an action, but the cases do not go further and say that in the case of injury to property a remedy lies only in favour of a trading corporation, and that other corporations are precluded from maintaining an action for libel unless they prove special damage. Non-trading

corporations have their affairs, their business, their interests respecting property, which must have the same protection and immunities and the same remedies in case of injury thereto as a trading corporation. The same principle applies to both, and what clearer authority could be cited for that proposition than the South Hetton case, above referred to, which settles the law that an action for libel will lie at the instance of a corporation for a libel tending to injure their reputation in the way of their business without proof of special damage? It affirms the principle that a corporation are in no respect on a different footing from an individual as to their right to sue for a wrong against them; subject, of course, to the limitation that there are certain things which a corporation cannat obviously do, such as murder, incest, adultery, etc., which crimes, if charged against them, would be such utter nonsense that they could not maintain an action in respect to such charges, it being impossible for a corporation to commit those offences. The allegations would be held as so much idle abuse, not injuriously affecting them.

The case of Mayor of Manchester v. Williams, supra, is not apposite. There the imputations were personal, and the property of the corporation was not affected. It might well be that charges such as were made there might result in the council being depleted of aldermen, but then there was the full statutory power and machinery provided for a contingency of that kind, whereby, perhaps, a better and more capable council would be elected to perfom the necessary duties on behalf of the public. That is not an authority for saying that had the municipal property or finances been injuriously affected by the statements complained of, the action could not be maintained. The point was not that the corporation was a non-trading corporation, and therefore the action was not maintainable, but rather that there was no injury done to the corporation's property or business. The grievance was a personal one—a charge of corruption against the personnel of the council, which did not, and, in a rational sense, could not, even tend to depopulate the municipality, thereby affecting its property. In the present case the tendency of the article in question is to prevent not only new members joining the plaintiffs, and the public from dealing with them, thus exposing them to liabilities and embarrassments wholly subversive of the due exercise of their statutory powers, but tending to seriously injure their property and

reputation—in short, completely removing their means of existence.

The case of White v. Mellen turns on the well settled point that an action for or in the nature of a slander title, will not lie unless the statement complained of is false, and false to the knowledge of the defendant, and has caused special damage. That case, I submit, has no analogy to the case now under consideration.

The Benevolent Societies Act empowers a company organized pursuant to its provisions to have a common seal and continued succession. It may contract and be contracted with, sue and be sued, plead and be impleaded, answer and be answered unto in all courts and places, and in all actions, suits, complaints, matters, and causes whatsoever. Upon incorporation it is introduced into the business community fully organized and equipped with by-laws and regulations, and with responsible management and facilities, enabling it to transact business appertaining to its corporate functions and powers. It becomes a body corporate and politic, having all the powers, rights, and immunities vested by law in such bodies: sec. 4, sub-sec. 6. And sec. 8 enacts as follows: "The members of an society, or branch society, incorporated under this Act, may, in the name of the society, or branch society, or in the name of the presiding officer, or other officer or officers thereof, acquire and take by purchase, donation, devise, or otherwise, and hold for the use of the members of the society, or branch society, and according to the by-laws, rules, and regulations thereof, all kinds of personal and also real property in this province, and the same, or any part thereof, from time to time may sell or exchange, mortgage, lease, let, or otherwise dispose of, and with the proceeds arising therefrom may from time to time acquire other lands, tenements, and hereditaments and other property, either real or personal."

I am of the opinion that the action is maintainable.

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MANITOBA.

MATHERS, J. SEPTEMBER 14th, 1907.

TRIAL.

EMERSON v. WRIGHT.

Costs—Apportionment of—Success of Plaintiffs—Failure on Allegations of Misconduct.

Motion by plaintiffs to vary as to costs the judgment of MATHERS, J., 5 W. L. R. 365.

MATHERS, J.:—After judgment had been delivered in this case the defendant presented a petition asking to have the matter re-opened and for permission to adduce further evidence, which petition I dismissed with costs.

Upon the hearing of the petition the question of the costs of the action was re-argued by consent of both parties. At the trial I had deprived the plaintiffs of costs, on the ground that they had, by their statement of claim, made serious allegations of misconduct against the defendant, in support of which no evidence was offered.

Further argument has convinced me that, in depriving the plaintiffs of all costs, I did them an injustice. The statement of claim does contain a number of damaging allegations, which the plaintiffs made no attempt to prove, and which I am satisfied were unfounded, but they did succeed in establishing some of the issues raised. It would be unfair to make the defendant pay all the costs, and, at the same time, it would be unfair to deprive the plaintiffs of the costs of the

issues on which they succeeded. Peacock v. Reddington, 5 Ves. 800, is an authority for, under such circumstances, apportioning the costs.

In my opinion, justice will be done by allowing the plaintiffs one-half the costs of suit up to and including the trial, and I. therefore, vary my former judgment accordingly.

BRITISH COLUMBIA.

(VICTORIA.)

AUGUST 1ST, 1907.

FULL COURT.

SNOW v. CROW'S NEST PASS R. W. CO.

Master and Servant — Injury to Servant — Negligence — Contributory Negligence — Defective Appliances — Findings of Jury — Evidence — Railway.

Appeal by defendants from judgment entered at the trial in favour of plaintiff, upon the findings of the jury, in an action to recover damages for personal injuries sustained by plaintiff owing to the alleged negligence of defendants.

The appeal was heard by HUNTER, C.J., IRVING, J., MORRISON, J.

S. S. Taylor, K.C., for defendants.

J. Martin, K.C., for plaintiff.

MORRISON, J.:—The injuries in respect of which damages are sought by the plaintiff were received whilst he was at work controlling trains of small cars or tubs, which carried the coal from the mine up into an elevated portion of a large building. His work consisted of standing at the lever by which he would cut off those cars by twos and let them run into a dump, which worked automatically. The cars, upon getting into this dump, would upset, depositing the coal into receptacles placed below, and then resume their upright position, whereupon the plaintiff would cut off two more loaded cars and let them run into the dump, forcing out, at

the other end, the two empty cars, which, continuing on the same track, proceeded down a grade on to a switch-back, returning out of the building on a down track, in the direction whence they came. During the course of a working day there would be about a thousand cars pass through the dump in this manner. After the empty cars left the dump, and proceeded over what is called a knuckle, a rather level portion of the track, they struck a deep grade, and in the course of a day there would be 7 or 8 go off the track, and sometimes, as at the time of the accident, turn over. In addition to attending the lever in question, the plaintiff was instructed by the defendants to replace these cars, and in so doing had the assistance of several other men. These cars had to be replaced very quickly, and during the busy hours there was very little time, as it necessarily delayed the work of dumping. Across from the track on which the empty cars were running after leaving the dump, was machinery containing cog wheels, exposed on the side towards this track. This machinery was 9 feet away. The plaintiff had no control or supervision over it, and its proximity and exposed condition were known to the defendants.

On the occasion complained of, several of the empty cars went off the track at the bottom of the grade, and the plaintiff and the other men pushed one of them up the grade, close to the dump, and left it there, not on the rails, but on the planks on which the rails were laid, and braced it with a lump of coal, the only available means of blocking it, according to the plaintiff's evidence, as was usual, to the knowledge of the defendants. Whilst engaged in putting the other car, which had been overturned, on the track, the car above broke away, and coming down struck the car which the plaintiff was replacing and threw him across the switch-back track against this machinery, and, in an attempt to protect himself, he put out his arms, one of his hands getting between the cog wheels. Before the machinery was stopped, his arm was drawn in and lacerated so that it had to be amputated. He now claims damages on the ground of the defendants' negligence in that the plant and machinery of the defendants was defective and unsafe, and that there were no appliances whereby one car, after being replaced, could be secured on the track above the men at work, replacing the other to prevent its breaking away and coming upon them, as alleged here. And that the place where the plaintiff was obliged to work was in close proximity to un-

guarded cog wheels, used by the defendants in operating an adjoining dump.

The defendants allege contributory negligence.

The fact that the cars left the rails so frequently seems to me to indicate some degree of defect, raising a presumption of negligence, and this defect was, of course, known to the defendants, for, apparently, it was the assigned duty of several workmen to replace them, and where there is a defect in works, ways, or machinery, there must necessarily be a risk to those engaged in or immediately about them, a risk which is imminent or proximate, or, as it were, running with the defect. Now the risk in this particular job arose from the defect in that part of the defendants' works which necessitated the plaintiff putting those cars on the track, and pushing them up that grade. The imminent risk which he ran was that of one or more of those cars coming back on him, whilst engaged in replacing the other on the track below, and injuring him there and then. As against that proximate contingency, he was apparently able to protect himself by various precautions and feats of agility. Can it be said, in circumstances such as existed in this case, that he assumed as well the risk of being thrown 9 feet across another track against machinery having those exposed revolving cogs, and over which he had no control or supervision? He was projected against them, and in using the means of defence with which nature endowed him, the injury was inflicted. Was there negligence on the defendants' part in leaving those cogs unprotected in such close proximity to the plaintiff's work? An element that may be considered in that connection is the simplicity and inexpensiveness of the contrivance necessary to afford that protection. In a concern of the magnitude of the defendant company, that expense would be almost infinitesimal. And are not indifference, thoughtlessness, a disregard for details, failure to anticipate the probability of exposed cogs causing danger to their workmen, all forms of negligence? Even assuming that the plaintiff was negligent in and about his own particular work, the immediate result of that negligence did not injure him. He was not injured by the car, which it is alleged he handled negligently. If that were so, I could discern some breadth in the line of defence. Whether he was escaping from the risk he saw eventuating, as he was entitled to do, or what amounts to the same thing, if in consequence of the position he adopted in lifting the car on

the track, so that should the upper car come down, he could not be crushed, but thrown to one side, or on the ground away from the car receiving, at most, a jar, there was nothing done as against which he might not provide, and which he might not reasonably have expected, always assuming that he undertook those risks. But can he be held reasonably, or at all, to have had present in his mind, or to have taken, the additional risk of being injured by machinery, negligently exposed as the jury believed, and not under his control? The position and conduct of the defendants must be just as closely scrutinized as that of the plaintiff. An employer who assigns work to an employee involving risk to life or limb, must neither place traps into which a man may fall, in his endeavour to escape, nor allow them even to exist. All this, however, was for the jury to consider, and, in my opinion, it was put fairly to them by the trial Judge, and they found there was no contributory negligence on the plaintiff's part.

As to the negligence of the defendants, there was evidence, which the jury believed, to shew that there were no sufficient appliances furnished the plaintiff with which to replace those cars when they jumped the track, which was in such a defective condition that cars frequently left it. That those conditions were known to the defendants, who ignored them, the jury also believed.

I think the trial Judge put the question of negligence and contributory negligence fairly to the jury.

I would dismiss the appeal.

HUNTER, C.J.:—In my opinion, the question comes down to this: Could the defendants have reasonably anticipated the likelihood of an accident happening such as happened the plaintiff? No doubt, it was of highly peculiar character, but it was such that the defendants were blameworthy for not having provided against it? The engine of mischief was distant between 9 and 10 feet from the place where the plaintiff was projected towards it, and, although I might have considerable difficulty by reason of this fact in concluding that the defendants were guilty of negligence quoad the plaintiff in leaving the cogs unguarded, I am unable to go so far as to say that there was no case to go to the jury.

With respect to contributory negligence, I think there was evidence on which the jury could reasonably reject this defence, and in any event I think it is immaterial whether or not there was any such negligence, as the leaving of the

cogs unguarded was the decisive cause of the accident, and whether that was negligence in the particular circumstances was, as already said, properly left to the jury.

There being a finding against contributory negligence which cannot be assailed, we are relieved from the necessity of considering whether there was any error in the Judge's charge on the question of so-called "ultimate" negligence, and this brings me to say a word about Brenner v. Toronto R. W. Co., 13 O. L. R. 423, 9 O. W. R. 198, so much relied on by the respondent. With great deference to the learned Judge who delivered it, I think the leading judgment in that case unnecessarily further complicates a subject which is already complex enough. In the ordinary action for negligence causing personal injuries, the question always is what was the decisive cause of the accident, which, if due to negligence, may be due to the negligence of the plaintiff or of the defendant, or to the concurrent negligence of both, and, while it may be difficult in the particular case to determine whose was the decisive act of negligence, I do not think that the solution of the problem receives any real aid by attempting to segregate and classify the various acts of negligence which are alleged to have been committed by either party and to have led up to the mischief.

I think the appeal should be dismissed.

IRVING, J., concurred.

BRITISH COLUMBIA.

(VICTORIA.)

LAMPMAN, Co. C.J. AUGUST 22ND, 1907.

COUNTY COURT OF VICTORIA.

WARREN v. WINTERBURN.

Landlord and Tenant—Implied Obligation of Tenant to Use Premises in Tenant-like Manner — Injury to Heating Plant in House — Evidence — Conduct of Tenant.

Action by a landlord against his tenant to recover damages for injury to a hot water heating plant in the house upon the demised premises.

A. E. McPhillips, K.C., for plaintiff.

J. P. Walls, for defendant.

LAMPMAN, Co. C.J.:—In August, 1906, the defendant became the tenant of the house in Belcher street then owned by T. M. Henderson, but who subsequently sold to the plaintiff; defendant continued to occupy the house until 15th January, 1907.

The house contained a hot water heating plant, and during the cold weather in January the defendant kept no fire in the furnace, and in consequence the water, which was allowed to remain in the radiators, froze and burst 8 of the radiators. Plaintiff's agents then notified defendant to repair the broken radiators, and, on his refusing to do so, they employed a firm of plumbers to make the necessary repairs, which cost $317.05, and that amount the plaintiff seeks to recover from the defendant.

There was no written lease, so the plaintiff relies on the implied obligation on behalf of the tenant to use the premises in a tenant-like manner. That there is such an obligation I do not think can be questioned: see Fox on Landlord and Tenant, 3rd ed., p. 127; Woodfall, 17th ed., p. 669; Wolfe v. McGuire, 28 O. R. 45; United States v. Bostwick, 94 U.S. 53; Yellowley v. Gower, 11 Ex. 279, note at p. 294. To use in a tenant-like manner means to use in an ordinary and proper manner, or in the manner in which an ordinary man would use his own premises, and the question I have to decide is, did the defendant so use the plaintiff's premises? In my opinion, he did. This was the first house he had occupied in British Columbia, and some weeks previously, when the weather began to get cold, as he was not using the furnace, he tried to drain off the hot water heating pipes and radiators, but found out that he could only do so by shutting off the cold water supply to the house; this would leave him without his ordinary supply of water for domestic purposes, so he concluded that it was the way of the country to leave the water in, and he let it go at that. There were two tanks in the house, but there was no stop valve between the two, so it was impossible to drain off the heating plant independently. Both the plumbers who examined it said there should have been such a valve, but there was none. It might be contended that the defendant, suspecting the dan-

ger, elected to take his chances, and so made himself liable, but I do not think that view is tenable, because, even if he had shut off the supply and run off the water by the tap in the cellar, some water would have remained in the radiators, unless he had turned the valve in each radiator. Defendant was not aware of this, and Mr. Colbert says that unless the precaution is taken of turning the valve in each radiator, enough water will remain to cause a break if frozen. Before the damage was done, the weather was so cold that defendant decided to start a fire in the furnace, and in that way heat the house, as the heat obtained from the fire in the grates was insufficient, but on account of the coal and wood shortage it was impossible for him to get fuel, and the supply he had on hand was so small that he had to husband it for cooking and for use in one grate. The weather was unusually severe, the most severe in 13 or 14 years, and a fair test to apply is to inquire as to what happened in other houses in the city—houses occupied by their owners, and whose user of their houses must be deemed to be ordinary and proper. Now it is in evidence, and it is in the knowledge of every one who was here during January, that water pipes were broken by frost in house after house, and for a few days the calls for plumbers were so many that they could not be attended to. In many of these houses the trouble would have been averted had the water been turned off and the pipes drained off in the evening, but the fact is that many owners had to pay plumbers' bills on account of neglecting this simple precaution. In some places, also, radiators were broken, and in one house the water froze and broke a radiator, although there was a fire in the furnace at the time. Instead of the defendant not using the house in a tenant-like manner, I think he has demonstrated that he used it in a manner comparing very favourably with the manner in which many owners used theirs, and, in my opinion, the plaintiff has failed to shew that defendant has not satisfied his obligation to use the premises in a tenant-like manner.

The action is, therefore, dismissed with costs.

BRITISH COLUMBIA.

(VANCOUVER.)

HUNTER, C.J. AUGUST 22ND, 1907.

TRIAL.

HUNTTING v. MACADAM.

Landlord and Tenant—Forfeiture of Lease—Relief against Forfeiture—Non-payment of Rent Excused by Oral Assurance—Authority of Landlady's Husband — Grounds against Relief — Mental Incompetence — Knowledge of Tenant—Evidence—Costs.

Action to establish the validity of a lease and for relief against the forfeiture thereof.

J. Martin, K.C., and C. W. Craig, for plaintiff.

E. P. Davis, K.C., and J. J. Godfrey, for defendant.

HUNTER, C.J.:—On 1st January, 1906, the plaintiff, as lessee, and defendant, as lessor, entered into a lease, in pursuance of the Leaseholds Act, of a dewlling-house in Vancouver, for the term of 5 years. The rent reserved was $70 per month, payable in advance, and the lease contained a proviso for forfeiture and re-entry after 15 days' default in payment of rent, and an exclusive option of purchase for the sum of $11,500, $2,000 of which was to be paid in cash, $1,500 in one year from such payment, $1,000 in two years from said date, and the balance of $7,000 in 15 years from said date; the unpaid instalments to bear interest at 6 per cent. payable half yearly, and the option to be a charge on the land. There was also a covenant by the lessee to conclude the purchase after payment of the $2,000, and to pay all rates and taxes after such payment.

Plaintiff, who is a person of means, being absent from the city during December, 1906, and up to 23rd January, 1907, by inadvertence allowed the rent for January, 1907, to fall in arrear, whereupon the defendant took possession by her bailiff, and has since kept possession, although on 23rd January, 1907, plaintiff duly tendered defendant, through her solicitor, she herself not being accessible, the sum of $140

for the months of January and February, 1907, and also offered to pay any costs incurred.

Plaintiff claims a declaration that the lease is a good, valid, and subsisting lease, and in the alternative that the forfeiture be relieved against; whilst the defendant contends that the lease was obtained throught an unconscionable advantage being taken by the plaintiff and her son of the mental weakness of the defendant's husband, which weakness was known to them, and that she executed it under coercion caused by the fear that her husband's health would be seriously affected if she refused.

Prior to the lease in question, the plaintiff and her son had occupied the premises under a two years' lease which expired on 20th June, 1905, and which included the defendant's furniture, at the rent of $100 per month. This lease also contained an option of purchase up to its termination, for $12,600.

This possession was continued up to the time of the lease in question under a lease dated 1st July, 1905, which was to run for 3 years and 3 months, which did not include the furniture, the rent reserved being $65 per month payable in advance, and there was no option of purchase.

Plaintiff, who seemed to me an eminently credible witness, although her memory was possibly at fault in one or two matters, says that during the negotiations for the lease in question the defendant's husband, who was acting for the defendant, brought it back to her executed by the defendant, but that, on finding that it stipulated that the rent should be paid in advance, she objected, saying that she was away a good deal, and that it was a nuisance to be thinking of it every month, and that she preferred to pay every year or 6 months; to which Mr. Macadam replied that she need not trouble herself on that account, that if she were out of the city the rent would be all right until she came back, and that she would never have any trouble in that way. She says she thinks her son and his wife were present at this interview, and that it was a repetition of one which had taken place in May, 1905, to which both Macadam and Mrs. Macadam were parties. When she left for the States in September, 1906, she sent a cheque for $210 to Mrs. Macadam, being the rent for October, November, and December, 1906; but not returning until the latter part of January, 1907, the rent being in arrear, her son, on or about 23rd January, sent a cheque for $140, being the rent for January

and February, 1907, which was refused by the defendant, as already stated. According to the plaintiff, there was also some discussion about painting the house and about the repairs, and, upon Mr. Macadam saying that he did not want the bother of the house, she offered to pay $70 per month instead of $65, which she had been paying, and look after painting and repairs, if she got the lease with the option, which was agreed to, she suggesting the option and Macadam fixing the times and amounts, saying that he did not care how long it ran after a certain amount had been paid, so long as they got the interest.

The plaintiff had no discussion with Mrs. Macadam in respect of the last lease, but on the former occasion, in May, 1905, both Mr. and Mrs. Macadam were anxious to sell for $10,000, and in December, 1905, Mr. Macadam offered it for $10,500. She denies that there was anything to suggest that Mr. Macadam was not competent to do business, or that she was warned by either Mrs. Macadam or Miss Hamilton that he was not in a condition to do business.

Plaintiff's son, who was living with her and contributed to the maintenance of the establishment, corroborates his mother's account of the assurance given by Macadam before the signing of the last lease, and also testifies to an interview in the summer of 1906, in which Macadam repeated the assurance that they need not worry over allowing the rent to run over when absent from the city. It also appears that during the currency of the second lease the defendant wished to remove her furniture, and that the house required painting, and that there was an arrangement come to whereby plaintiff should not pay any rent after the removal of defendant's furniture until the arrival of her own furniture; and under this arrangement no rent was paid during October, November, and December, 1905, and evidently one reason for the parties entering into the new lease in January, 1906, was to start de novo, and was on account of the different arrangement arrived at about the painting, by which plaintiff undertook to do it before June, 1906, and, according to both the plaintiff and her son, the increased rent, which was stated to be the highest rent paid for an unfurnished dwelling in Vancouver, and the undertaking to do the painting, was the consideration for the option of purchase. The son also states that Mr. and Mrs. Macadam offered it to them for $10,000.

At the time the Macadams moved out their furniture there was some dispute as to whether they were entitled to remove the andirons and shelves that fitted into the wall, and while the son denies that he threatened Macadam with action, at any rate they were not removed.

Mrs. W. F. Huntting corroborates the others as to the assurance about the overdue rent at the interview in May, 1905, and also says that the Macadams wanted to sell for $10,500, on practically the Hunttings' own terms, and further than one motive for obtaining the option was to prevent the bother of moving if they did not want to. She was not present at the negotiations in December, nor at any time when there was any warning given not to do business with Mr. Macadam.

The main ground of defence on the facts was that Macadam was incompetent to transact any business, to the knowledge of the plaintiff and her son, and that, therefore, there should be no re-habilitation of the lease, because an undue advantage was taken of Macadam's condition to coerce Mrs. Macadam into executing the lease.

In support of this defence Dr. Burnett was called, who stated that he began to attend Macadam in 1900; that he died of senile dementia in December, 1906, at about 66 or 68 years of age; that towards the latter part of 1905 he saw him every week, when he had dizzy spells and convulsions, three of which he attended; that he found his memory failing; that he was not fit to do business by reason of these attacks, which caused brain congestion. He further says that senile dementia exists on the average to such an extent as to incapacitate for business about two years before death, and that it would be rare for a man to be able to do business a year before his death from that cause. On the other hand he says that at the end of 1905 "in a general way he could talk quite clearly;" "a person who did not know the significance of such things might not know that it meant anything more than a hesitancy in talking;" and that he "never particularly talked any business with him."

Mrs. Macadam says that she noticed a great change in her husband in the spring of 1905; that he had a seizure in May, and from that time on was in very poor condition; that he was unkind, careless in his dress, and lost money; that his father was in the asylum; and that an aunt and uncle died in the same way. He spent money on the house without consulting her, and she was ignorant of the fact that he intended

to rent it after the first lease expired and wanted to move into it herself. The reason why three years and three months was fixed on as the term of the second lease was that she thought if anything happened to her husband, and she wished to sell, she would be in a better position to sell in the autumn than in the summer.

She denies that at the interview in the spring of 1905 there was any arrangement made as stated by W. F. Huntting and the two Mrs. Hunttings about the overdue rent, and says that all that passed about selling was a sarcastic query by her as to whether Mrs. Huntting thought the place worth $10,000, and that the latter replied that she would not have it at any price. She also says that shortly after the second lease was signed she refused to sell the place for $12,000, and that, in the presence of Miss Hamilton, and Mrs. Huntting junior, she asked Mr. Huntting to come to her if he had any business in connection with the house; that a few days afterwards she told plaintiff that the doctors had warned her that her husband was liable to die at any time in an attack, and to keep all business away from him, and that again a few days afterwards Mr. and Mrs. Huntting came to her house, and in the course of a discussion as to putting in hardwood floors she again warned him that Macadam was not capable of transacting business.

Before she signed the lease in question she says she had a discussion with her husband, and that she strongly objected to signing it, but yielded when she found that it was causing him much worry, and that he was likely to have a seizure.

Miss Hamilton knew Macadam from the spring of 1904, and says that she noticed instances of impairment of memory; that he would say things one day and contradict them the next; that he talked of building a 10 or 12-roomed house with a 25-foot verandah for $800; that there was a conversation in October, 1905, at which Huntting and his wife, his mother, and Mrs. Macadam, were present, in which the defendant told Huntting that she had refused an offer of $12,000 for the house, and that she would not sell it at any price, as she wanted to live in it; that on the same day she also asked him to come to her on any business in connection with the house, as the doctors had said that her husband was not to be worried with business, and further that there was some discussion about the things that Mrs. Macadam was taking out of the house; and that Huntting

threatened to put the matter in Court. She also says that shortly afterwards there was a discussion about putting in hardwood floors, when on Huntting saying that he would consult Macadam the defendant again told him that he was incapable of doing business. Huntting told Macadam that he could collect $15 per day for the time he was at the hotel by reason of the house being left without any furniture. About this time she had a conversation with the plaintiff, who said, on her remarking that Macadam was not capable of doing business, that that was not her affair, and that she had done her business with Mr. Macadam, and Miss Hamilton admits that she never did any business herself with the deceased.

Mr. Gallagher, a real estate agent, states that in 1903 he had made an arrangement to go into business with the deceased under certain conditions, but found him incompetent to do business after two or three interviews, as his memory was failing, and also on one occasion that he had an hallucination about his wife.

Another witness, Bell, says that he became acquainted with the deceased in August, 1903, and met him almost continuously up to his death; "there was something peculiar about him, not so much pronounced at that time, but subsequently. My first impression was confirmed that there was something strange about the man's train of thought, that he was not consecutive in ideas, and sort of contradicted himself;" and he "decided to put him in the suspense account, and not to indulge in any business ventures with him." But he is unable to say that if he had adopted any of Macadam's suggestions as to business investments he would have made a bad investment.

Mr. Waterfall says that he had several business conversations with the deceased in 1905 and 1906; that he was infirm in body and rather inclined to be childish; but in cross-examination he admits that he talked rationally on most occasions, and that he never heard him make ridiculous statements; and that he would not go so far as to say it was not possible for him to do business during 1905. This witness also, on being re-called to verify or correct a former statement, gave it as his opinion that it would be impossible for a stranger to have a business transaction with the deceased at the end of 1905 and January, 1906, without realizing that he was incapable; but I think the evidence

is clearly inadmissible as being a matter for the Court and not the witness.

Dr. Wright, a Presbyterian minister, knew Macadam for three years before his death, and met him frequently, says that he talked usually more or less incoherently, and had visionary schemes, but admits that he has helped to work up the case and has no doubt about Mrs. Macadam's having the right side of the case.

Mrs. Macadam's sister also says he was incoherent, and that on one occasion (she could not say before or after the lease was signed) he wrapped his clothes up in separate parcels, saying that that made them handier to get at than on the hooks.

Lisle Wright, a nephew of the defendant, corroborates the defendant's account of the hardwood floor conversation, and also says that he heard Huntting ask Macadam to see the Hudson's Bay Company, but that the latter said he could not enter into a lawsuit, and told Huntting to go and see Mrs. Macadam.

In rebuttal, Mr. Prescott, a real estate agent, says that the property was listed with him by the deceased in December, 1905, for sale at $11.500, but that he could not sell it on account of not being able to give possession. He did not observe any mental weakness in the conversation of the deceased, although this was the only business transaction he had with him.

Mr. Jukes, manager of the Imperial Bank, met the deceased once in his bank in September, 1905, when he came in with Leeson to indorse the latter's note, and did not observe anything in his conversation to suggest incapacity, but did not pay very much attention, as he was satisfied with Leeson's ability to meet the note.

W. W. Johnson, fire insurance agent, met deceased in June, 1905, when he called in to pay a premium, and noticed nothing unusual in his conversation. He talked intelligently and objected to the amount of the premium.

D. C. McGregor, insurance agent, knew deceased for a long time, met him two or three times during 1905 and once or twice in 1906, the last occasion being shortly before his death. There was nothing in his demeanour to suggest that he was irrational, nor anything rambling or incoherent in his conversation.

T. J. Smith, broker, had business relations with the deceased during 1904 and 1905, more or less up to the sum-

mer of 1906; met him frequently at different intervals, considered him perfectly sane, but after the spring of 1904 he seemed unable to stand any business strain without doing himself considerable injury; would not intrust him with any business after 1905; did not treat his offer to sell the house for $11,000 seriously, as he did not know whether Mrs. Macadam was willing.

In this conflicting state of the evidence, having regard to the fact that the burden is on him who asserts incompetency in an adult to prove it, I think it is impossible to say that it has been made out. But, even assuming that it was, I am unable to find that knowledge of it was brought home to the plaintiff or her son. The question of the last lease was no new thing to either the Hunttings or the Macadams, and, while he might have shewn himself incapable of transacting business to which he was not accustomed, there was nothing about this transaction which, even assuming that his powers had considerably failed, he might not manage capably enough.

Moreover, it will be observed that even Mrs. Macadam does not go so far as to say that any of the Hunttings were distinctly warned that he was mentally unsound, and, assuming that one or more of them were told that he was not capable of attending to business, or that his life was endangered by his attempting to do business, that might easily be understood as a warning that he was physically but not necessarily mentally incompetent.

Furthermore, assuming either mental incapacity or want of authority known to the plaintiff, I think Mrs. Macadam estopped herself from raising any such question when she allowed the executed lease to be handed to the plaintiff without any warning or protest.

Sir Charles Hibbert Tupper, who acted as her solicitor in revising the lease, was called and testified that she and her husband came to him with the draft lease, and that, on his drawing attention to the option, Macadam said abruptly and distinctly that the matter was settled, and that, as Mrs. Macadam said nothing. he did not pursue the subject. Of course what passed could not be admitted as against the plaintiff, but it seems to me that if Mrs. Macadam was averse to signing the lease, she should have signified to the plaintiff or her son, either directly or through the solicitors, that she was not a free agent, and in that way apprise them that she was doing so under protest and reserving her rights.

for. as the Lord Chancellor says in Vigers v. Pike, 8 Cl. & Fin. at p. 652, "A man who with full knowledge of his case does not complain, but deals with his opponent as if he had no case against him, builds up from day to day a wall of protection for such opponent which will probably defeat any further attack upon him."

Even if clear notice that her husband was mentally incompetent, or that he had no authority to represent her, had been given, and not merely that his health was precarious, or that he should not be worried with business, which is, I think, the only extent to which the evidence goes if accepted, it would, I think, have availed nothing, in view of the fact that the lease signed by her was handed to the plaintiff without any accompanying protest, and Sir Charles cannot say that he gathered from anything she said that she objected to signing the lease.

As far as the evidence afforded by the lease itself is concerned, there is nothing intrinsically unconscionable or unfair in the option. The option is exercisable only by paying $2,000 in cash, another substantial payment of $1,500 is required in a year, and the balance is outstanding at 6 per cent., which, considering the locality and the nature of the property, is good interest. So far as the price is concerned, no doubt property was offered for considerably less a few months before, and there is no certainty that its value may not fall very materially before the last payment is due.

With respect to the assurance alleged by the plaintiff to have been given, that she need not worry about allowing the rent to run over if she were absent from the city, I see no reason to doubt that such assurance was twice given her before the lease in question was signed, and once by the deceased to the son after it came in force. In view of the fact that she was given to travelling, and that the son was also contemplating a journey, it was a very natural question to ask for the purpose of getting an assurance one way or the other on the matter, and while the assurance given before the lease was signed may not found any equity to relief, as being part of the negotiations which became merged in the covenant to pay in advance and the proviso for re-entry on default, still I think the assurance given the son after the lease was in force does afford a ground for relief, especially as the defendant took the benefit of three months' rent being paid in advance of the regular times of payment,

which might well give the plaintiff reason to suppose that the defendant was not intending to insist strictly on the letter of the lease.

With regard to Mr. Davis's contention that the Court ought not to rehabilitate the lease, as it contains an option of purchase, I have not been referred to any case in which it has been so laid down in terms, and Coventry v. McLean, 21 A. R. 176, referred to by Mr. Davis, is not, I think, an authority for the proposition, as, although it is somewhat difficult to say how far Mr. Justice Osler meant to go in his judgment, the case itself only decided that where the lease has expired from effluxion of time, at the time of the trial the Court could not restore it for the purpose of reviving an option or purchase contained in it; and I am at a loss to understand how the Court can, by any judgment it gives, work out jurisdiction to extend in invitum the time within which an option of purchase may be exercised, as obviously this would be to substitute a new agreement for that of the parties.

On the other hand, in Newbolt v. Bingham, 72 L. T. N. S. 852, cited by Mr. Martin, it is laid down by the Court of Appeal that if the position is not altered so as to cause injustice, and if no interest of third parties has intervened, there is no longer any real discretion in the matter, but the Court must give the relief as a matter of course.

Here, so far from causing injustice by restoring the lease, in view of the conclusion that I have come to on the questions of fact, I should be causing injustice if I were to refuse to restore it, as the option, which was part of the consideration for the increased rent, would be annihilated.

As to the costs. Under the old practice in ordinary cases of neglect to pay the rent punctually, the Court treated the matter as a suit for redemption, and the general rule was that the party seeking to redeem paid the costs. But it is pointed out by the Lord Chancellor in Gerahty v. Malone, 1 H. L. C. at p. 91, that this rule did not tie the hands of the Court, and that the Court might have regard to all the circumstances. Moreover, I think the action within the scope of Rule 976, and I cannot see any good cause for depriving the plaintiff of her costs, as I think the defendant had no solid ground for refusing the tender.

There will, therefore, be judgment for the plaintiff relieving against forfeiture, with costs.

NORTH-WEST PROVINCES.

(EDMONTON.)

SCOTT, J. MAY 21ST, 1907.

CHAMBERS.

GOODE v. JOURNAL PUBLISHING CO.

Defamation—Pleading—Defence — Offer of Apology — 6 & 7 Vict. ch. 96 (Imp.) — Newspaper Libel — Appeal to Court en Banc from Order in Chambers—Necessity for Consent of Judge in Chambers—Costs.

Motion by plaintiff to strike out a portion of the statement of defence in an action for a libel alleged to have been published in defendants' newspaper.

J. R. Boyle, for plaintiff.

G. B. O'Connor, for defendants.

SCOTT, J.:—The portion of the defence sought to be struck out is paragraph 10, which is as follows: "The plaintiff did not demand an apology before action brought, but the defendants, by their solicitors, on or about the 14th day of January, offered to publish an apology satisfactory to the plaintiff, which offer the plaintiff refused, and the defendants claim the benefit of chapter 96 of the statute 6 & 7 Victoriæ."

The grounds of the application are that the paragraph referred to discloses no legal ground of defence, that it is embarrassing, and that the defendants are not at liberty to plead the matter contained in it without at the same time paying money into Court, which was not done.

Section 1 of Lord Campbell's Act, 6 & 7 Vict. ch. 96, authorizes a defendant in any action for defamation (after notice in writing at the time of filing the defence) to give in evidence in mitigation of damage that he has made or offered an apology to the plaintiff. Section 2 provides that in an action for libel contained in any newspaper or other periodical publication, the defendant may plead that such libel was inserted without actual malice and without gross negligence, and that before action or at the earliest opportunity afterwards he had published an apology.

It was contended on behalf of the plaintiff that sec. 1 did not apply to cases of newspaper libel, because sec. 2 had made special provision for them.

I cannot uphold this contention. Section 1 appears to apply to all cases of defamation, and I can find nothing in sec. 2, or in any other portion of the Act, which in any way restricts its application.

In Odgers on Libel, 4th ed., p. 596, the author expresses the view that sec. 1 is not restricted to the cases other than for newspaper libel.

Section 1 authorized the defendant to give the matter of the apology in evidence merely in mitigation of damages, whereas sec. 2 authorized him to plead it. It seems, however, that matter tending to mitigate damages may be set out in the pleadings without thereby rendering them embarrassing: see Odgers, at p. 597, and the cases there referred to.

The statute 8 & 9 Vict. ch. 75, amending Lord Campbell's Act, which requires the payment of money into Court, with a plea of an apology, applies only to pleas under sec. 2 of the Act. It has no application to sec. 1.

The application is dismissed, with costs to the defendants in any event on final taxation.

[On appeal the Court en banc held that the appeal was not properly before the Court, as the consent of the Judge who made the order had not been obtained, but, as the respondents' advocates had consented to an order to typewrite the case, there should be no costs to either party.]

NORTH-WEST PROVINCES.

(CALGARY.)

JULY 17TH, 1907.

FULL COURT.

REX v. DOLL.

Municipal Corporations—By-law—Early Closing of Shops—Powers of Council—Offence—Selling Goods—Conviction.

An application to quash a conviction made by Crispin E. Smith, police magistrate for the city of Calgary, whereby

L. H. Doll was convicted of having violated the provisions of by-law number 705 of the city of Calgary.

The application was made upon several grounds, two of which were as follows:—

1. That the conviction was bad because by-law No. 705 was illegal and void, in that it was in excess of the powers conferred upon the council of the city by the legislature of the province of Alberta.

2. That the conviction was bad in that by-law No. 705 made the selling of goods the essential element of the offence for which a conviction might be made, whereas the city had power only to pass a by-law for fixing, altering, and regulating from time to time the hours of opening and closing retail stores and places of business within the city, or certain portions thereof.

The application was heard by SIFTON, C.J., WETMORE, SCOTT, HARVEY, and STUART, JJ.

R. B. Bennett, K.C., for the applicant.

J. S. Hall, K.C., for the city corporation.

WETMORE, J.:—This is an application for a certiorari to bring up a conviction against the applicant Doll for not keeping his place of business closed in contravention of by-law No. 705 of the city of Calgary, and to quash such conviction. A number of objections were taken to the conviction. only one of which it is necessary for me to consider, namely, that the conviction is bad inasmuch as the by-law makes the selling of goods the essential element of the offence for which a conviction may be made, whereas the city only had power to pass a by-law for fixing, altering, and regulating the hours of opening and closing retail stores and places of business within the city or certains portions thereof. The by-law in question was passed under the provisions of ch. 55 of the Acts of Alberta, 1906, which conferred upon the city council the power to pass by-laws: "(86) For fixing, altering, and regulating from time to time the hours of opening and closing retail stores and places of business within the city, or certain portions thereof, and for exempting from the operation of such by-law certain classes of business, and for imposing a penalty for breaches of such by-law;" pro-

vided that a petition therefor was presented as prescribed. This power will be found on p. 496 of the Acts of 1906. The by-law that was alleged to have been passed in pursuance of this authority is, leaving out the recitals and the parts not material to the question I am now discussing, as follows:—

"1. Every person carrying on a retail store or place of business within the city of Calgary, with the exception of those persons carrying on the business of a newsdealer, tobacconist, druggist, or licensed victualler, shall keep such retail store or place of business closed from 6 p.m. until 7 a.m. on Monday, Tuesday, Wednesday, Thursday, and Friday in each and every week, and from 11 p.m. on Saturday in each and every week until the hour of 7 a.m. on the following Monday, excepting on the day preceding any legal holiday, when every such person shall keep his store or place of business closed from 11 p.m. to 7 a.m. on the day following such holiday, except again as hereinafter mentioned, and no such person shall during the hours aforesaid and in his said store or place of business sell or agree to sell or offer to sell to any person whatever nor accept any order for any wares or merchandise."

"6. Any person guilty of an infraction of this by-law shall be liable on summary conviction to the penalties prescribed by section 149 of Ordinance number 33 of 1893 of the North-West Territories, but before any person shall be convicted of an infraction of this by-law it must be proven that such person did during the hours hereinbefore mentioned in his store or place of business sell or agree to sell or offer to sell or accept any order for an article of goods, wares, or merchandise not usually sold by a newsdealer, tobacconist, confectioner, fruiterer, druggist, or licensed victualler."

I am of opinion that this by-law is not authorized by the Act in question. It practically provides a penalty for selling goods or agreeing to sell them or offering them for sale or accepting orders for them during the prescribed hours, not for keeping a place of business closed as provided by the by-law. Under the provisions of this by-law a person may keep his place of business open during the prescribed hours without any consequence resulting from it. It is only when he sells that he becomes liable to the penalty.

It seems to me utterly immaterial in what language the by-law may be couched; what I have stated is the practical effect of it. It is not the intention of the Act to have persons fined for selling, but the penalty was to be imposed for keeping a place of business open during the prescribed hours. It seems to me that to put a construction upon this Act, such as the city council have attempted to put upon it by this by-law, would defeat the intention of the legislature. Legislation of this character throughout Canada is, comparatively speaking, of recent date, and the object of it was to enforce what is called the early closing movement as regards retail stores and places of business, and to assure that all persons in business of the character specified in the by-law should alike be compelled to keep their places of business closed, so that one man should not keep his place of business open during the prescribed hours while another kept his place closed. If a person is allowed to keep his place of business open during the prescribed hours, and is only liable when he sells, the difficulty of enforcing the law would be very greatly increased, and the temptation to evade the law or defy it would also be greatly increased. Now, I do not consider it necessary to discuss the question what constitutes "being closed" under the provisions of the Act, whether it means an actual closing by being locked, or whether it means a closing in the sense of not actually transacting business in the shop, because, whether it is a closing by being locked or whether it is a closing by not transacting business, the result, so far as this by-law is concerned, is the same—the party is not liable until he sells. Therefore, if the closing is an abstaining from doing business, a person may have his store wide open for the purpose of doing business and he would not be liable to a penalty until he actually sold, and I can readly conceive that in very many instances the fact of selling might be one very difficult to prove. I cannot believe that the legislature ever intended anything of this sort.

My opinion, therefore, is that a certiorari should issue to bring up the conviction, and that, on such certiorari being returned with the conviction, the conviction should be quashed.

SIFTON, C.J., and SCOTT, J., concurred.

STUART, J.:—I am of opinion that the by-law in question in this case is clearly within the powers conferred by the

legislature. The Act gives the council power to pass by-laws "for fixing, altering, and regulating the hours of opening and closing retail stores and places of business" within the city. In my view, the real meaning and intention of the Act is to give the council power to fix, alter, and regulate the hours during which persons may carry on their business in retail stores and places of business in the city. I cannot believe that the legislature had in view the mere mechanical operation of opening and closing the doors or other means of entrance and exit to retail stores and places of business. The ordinary man for whom the legislation was passed would surely understand from the Act that what the council were being permitted to do was to fix the hours during which merchants might carry on their ordinary business. This being so, it seems to me to be clear that the council have done nothing beyond this, and were quite within the power given them in passing the by-law they did. It is said that the council had no power to prohibit a man from selling goods, but the prohibition contained in the by-law is not in such general terms. The by-law merely refers to a sale or offer to sell in his retail strore or place of business. This, I think, the legislature intended to give the council power to deal with. Certainly the power to order the closing of stores during certain hours must mean, if it means anything effective or within the purpose of the statute at all, that the sale of goods within the store which would constitute a carrying on of ordinary business may be prohibited. In fact, I have no hesitation in saying that the words "closing retail stores" in the statute mean and were intended to mean "ceasing to carry on business in retail stores." Reading the by-law as a whole, I can find nothing in it, therefore, which in any way exceeds the power given by the statute. The by-law fixes certain hours during which certain retail stores must be closed. It is admitted that so far the by-law is intra vires. Adopting then the interpretation of these words which I do, I can see no reason why the council may not state a minimum amount of "carrying on business," if I may use the expression, which will be necessary before there shall be a conviction. The by-law as it stands does not, and cannot by any interpretation of it be said to, declare that a man shall be fined for making a sale. He may be fined for not closing his store, and for that only. It is still open to the Court before which he is brought

to say whether he has or has not in fact closed his store, and to find that he has closed it in compliance with the Ordinance, even though an actual sale or offer to sell may be proven. The by-law does not say that if a sale is proven then there has been a failure to close, and, therefore, an infraction of the by-law. Even though 10 sales may be proven, it is still, as the by-law is worded, open to the Court, if it pleases, to find that the store was closed. What the by-law says is that unless at least one sale or offer to sell is proven, then there shall be no finding that the store was not closed. The council were careful to keep within the power given them. They were careful, as is abundantly evident from the way the by-law is drawn, to see that no injustice or oppression should result from the passing of the by-law, and it seems to me to be an extraordinary thing to say that, because they have been thus careful, because they have held themselves far within the meaning of the statute, and have provided that unless there has been some overt act of carrying on business, then the men shall not be fined—that for this reason their by-law is bad. It is said that as the by-law stands a man may keep his store wide open and have his clerks there and exhibit his goods and yet not be fined unless he makes a sale. That is true; but that was surely a matter of policy for the council to decide and not a matter of law for this Court. The effect is not to fine a man for selling goods, as I see it, but is rather to insist for the protection of the man that he shall have been proven to have done something in a substantial way that is forbidden by the order to close his store before he shall be fined for not having done so.

The cases cited by counsel for the applicant do not appear to me to touch the point in any way. In every one of them the Court held that the council had gone beyond the powers given them by the statute under which they were acting. We are here interpreting a different statute and a different by-law, and the cases cited are of no assistance to us in so doing.

Something was said as to the difficulty of enforcing the by-law as it stands. I think it extremely probable that the council avowedly and purposely added the clause so that it would not be so very easy to secure a conviction, and that this was done in order to prevent the oppressive operation

of the by-law, but that, again, was a matter of policy for the council to deal with, and, if the by-law is within the powers given by the statute, should not concern this Court in any way.

With regard to the remaining objections to the conviction, I am of opinion that none of them can be sustained. The direction as to distress is clearly permissible under the provisions of the Criminal Code, sec. 739, which are applicable to the case. The fact that two days are stated upon which the offence was committed is evidently to be accounted for by the fact that the period during which the offence was committed and during which the closing is ordered by the by-law consisted of part of one day and part of another. The conviction might possibly have been more accurately drawn, but I do not think that there is here any defect which is fatal to the conviction.

It was also objected that there was no evidence at all upon which the magistrate could convict. Assuming it to be open to the defendant to take this objection, as to which I say nothing, I am of opinion that there was evidence from which the magistrate could reasonably, if he saw fit, make the inference that the sale was made by the defendant. The defendant stood beside the auctioneer behind the counter, the sale was made in the defendant's store, where he generally carries on business, and was of an article such as he usually sells. I can see no distinction between an auctioneer employed by the defendant and a clerk or other employee, and it seems to me that a sale by a clerk in the defendant's store, at least when made in the defendant's presence and with his knowledge, constitutes a sale by the defendant within the meaning of the by-law. The magistrate certainly had some evidence, therefore, from which the inference of a sale by the defendant could reasonably be drawn, and that is the only question which we could in any case consider on this application. I think, therefore, that the writ should be refused and the application dismissed.

HARVEY, J., agreed with STUART, J.

NORTH-WEST PROVINCES.

(CALGARY.)

STUART, J. JULY 19TH, 1907.

TRIAL.

STRINGER v. OLIVER.

Vendor and Purchaser — Contract for Sale of Land — Payment of Purchase Money by Instalments—Time of Essence of Contract — Acceptance of first Instalment after Default — Refusal to Accept Second — Notice Cancelling Contract — Issue as to Waiver — Forfeiture of Moneys Paid — Relief against — Costs.

Action by purchaser against vendor for specific performance of a contract for the sale and purchase of land. Counterclaim by vendor for a declaration of nullity of the contract and forfeiture of the moneys paid under it.

W. J. Millican, for plaintiff.

S. L. Jones and P. J. Nolan, for defendant.

STUART, J.:—On 18th January, 1906, the plaintiff Stringer, one A. A. Dick, and the defendant entered into an agreement in writing and under seal whereby the plaintiff and Dick agreed to buy from the defendant certain lots in the city of Calgary for the sum of $950, payable as follows: $350 in cash on the execution of the agreement and the balance of $600 in two equal instalments of $300 each in 3 and 6 months respectively from the date of the agreement. These instalments were to bear interest at 8 per cent. per annum. The agreement further contained the following clause: "And it is expressly understood that time is to be considered the essence of this agreement, and unless the payments are punctually made at the times and in the manner above mentioned, these presents shall be null and void and of no effect, and the said party of the first part shall be at liberty to resell and convey the said lands to any purchaser thereof, and all moneys paid thereon shall be absolutely forfeited to the said party of the first part."

At the time of entering into the agreement the defendant himself held the lands on an agreement of purchase from the firm of Bennett & Ross, real estate dealers in Calgary. He had given that firm two promissory notes for $300 each for instalments of the purchase money due to them. These notes bore interest at 8 per cent. and fell due on 18th April and 18th July, respectively, these being the dates on which the plaintiff's two instalments fell due to the defendant. There was evidence tending to shew that the plaintiff knew of these obligations of the defendant, and that the dates of payment by the plaintiff were so fixed as to enable the defendant to meet them. When the first note to Bennett & Ross fell due on 18th April, the defendant did not meet it, being disappointed in not receiving on that date the instalment due him from the plaintiff. However, as Bennett & Ross did not press him for a few days, he said nothing to the plaintiff, and finally the plaintiff, on receiving a letter directly from Bennett & Ross intimating to him that the defendant's note had not been met, and that they expected him (the plaintiff) to meet it, went to the Bank of Nova Scotia, where the note was held, and gave to that bank a cheque in the bank's favour for the amount of the note and interest. This payment was, therefore, the exact amount required to meet the second instalment due to the defendant. The cheque was given on 28th April, and the bank applied it on the defendant's note to Bennett & Ross. Nothing more occurred between the parties in respect to this instalment. There was, in fact, no evidence of any conversation at all between them in regard to it. On 3rd May Dick assigned all his interest in the agreement to plaintiff, and some time afterwards the plaintiff went East on a trip to Ontario. He made no arrangements and left no instructions with any one for the payment of the last instalment, which fell due on 18th July. He did not return to Calgary until about 28th or 29th July, that is, 10 or 11 days after the final instalment was due. Upon returning, he found among the letters awaiting him the following notification from the defendant, which the defendant had, a few days before sent to him through the post.

"Calgary, Alta., July 26, 1906.

"Mr. Bert A. Stringer,

"Calgary.

"Dear Sir: I hereby notify you that our agreement whereby I sold you and A. A. Dick, who, I believe, has as-

signed his right to you, the north 50 feet, etc., etc. (describing the property), has been cancelled on account of default in payment and your former agreements have been forfeited.

"Yours truly,

"L. P. Oliver."

The payment due on 18th July had not, in fact, been made by the plaintiff nor by any one on his behalf. After receiving the above notice the plaintiff sought out the defendant and meeting him on the street asked him what he intended to do about the matter. The defendant replied by asking the plaintiff what he intended to do, and the plaintiff said that he was ready to pay the balance. This the defendant refused to accept, but he intimated that if an additional $100 were paid, the deal could still go through. The plaintiff refused to pay this and offered an additional $25, which the defendant in turn refused, and the interview ended. Afterwards the plaintiff, in company with his advocate, tendered the defendant a marked cheque for $314.50 and a transfer for signature. The defendant refused to accept the money or sign the transfer, and again intimated that if $100 more had been offered, he would have signed. The plaintiff then brought this action for specific performance of the agreement. The defendant, relying on the clause in the contract above quoted, defends the action, and by counterclaim asks for a declaration that the contract is null and void and that the sums paid have been forfeited.

There is practically no dispute as to the facts except with regard to the plaintiff's offer of $25, which the defendant denies. This, however, is not material. The simple question presented for decision is whether the clause quoted is still binding upon the parties, or whether its provisions have not been waived by the defendant.

At law, time was of the essence of contract, even if nothing more was stipulated than a date for completion. Equity relieved against this, and it became a rule that, unless there was something to shew that the parties really intended time to be of the essence of the contract, then completion within a reasonable time was sufficient. This rule is well understood, but the mistake must not be made of applying it to the case where the parties have by their agreement not merely stipulated for a definite time for payment, but have also expressly declared their intention in so many words that time shall

be of the essence of the contract. There could, I should think, be no better means of ascertaining the real intention of the parties than by reading what they have said and solemnly agreed to. It is true that in many cases where the agreement has contained this special clause or something similar the Courts have discovered something in the surrounding circumstances or in the acts of the parties to indicate that the parties did not really mean what they had said. But it wil be observed that where nothing more than a time for payment is expressed the presumption in equity is that this was not intended to be essential, and the burden of proving the essentiality of time is thrown upon the party seeking to take advantage of it. On the other hand, where the parties have expressly declared their intention in so many words, the presumption is, I think, thot they meant what they said, and the burden of proving that time is not essential is thrown upon the party seeking to escape from the express provision of the contract. Authorities, therefore, which apply clearly to the first case cannot be relied upon to any great extent where the second case which I have stated has to be dealt with. It is for this reason that I doubt whether the authorities cited by Perdue, J., in Barlow v. Williams, 4 W. L. R. 233, the case chiefly relied upon by the plaintiff, are quite sufficient to uphold the conclusion drawn from them in that case. In any event, there were special circumstances there, such as possession, etc., which do not exist in this case; and therefore I do not think that the case cited can be of much assistance to the plaintiff

There are no circumstances shewn in the beginning—at the time of the formation of the agreement—which point to any different intention than that expressed therein, and there are only two subsequent circumstances which can in any way point to a waiver of the provisions of the clause by the defendant. The first circumstance is the payment of the first of the deferred instalments 10 days after it was due, its acceptance by the defendant, and his failure then to insist upon the forfeiture. Now, there is no doubt that the defendant did, in fact, waive his rights with respect to that instalment; but it seems to me that there were special reasons for his doing so. Bennett & Ross did not press him, but were looking directly to the plaintiff. As long as they were satisfied, the defendant had no special reason for complaint. It is clear that the plaintiff knew that there was another

note falling due on 18th July, and that defendant was expecting again to rely upon his prompt payment in order to meet this. I am, moreover, of opinion that the waiver with respect to the one instalment did not constitute a waiver of the right to insist on the operation of the clause with respect to the later instalment. In Forfar v. Sage, 5 Terr. L. R. 255, McGuire, C.J., held that the acceptance of one instalment after it fell due did not constitute a waiver with respect to a subsequent instalment. He said in that case that "the default in payment of the third instalment was a new breach which gave a new right to Wilkins to treat the agreement as being abandoned by the purchasers."

In Hunter v. Daniel, 4 Hare at p. 432, Vice-Chancellor Wigram said: "I agree with the defendants that each breach on the part of the plaintiff in the non-payment of money was a new breach of the agreement, and that, time being of the essence of the contract, each breach gave the defendants a right to rescind the contract."

It is also clear that a mere extension of time does not constitute a waiver of the conditions of a contract as to the essentiality of time, but merely applies those conditions to the new time fixed: Barclay v. Messenger, 30 L. T. 350. If, therefore, the plaintiff had even actually asked for time to make the payment of 18th April, and the time had been by express agreement extended to the 28th, it is plain that this would not have constituted a waiver of the clause entirely, and I do not see any reason why there should be a different result where there is what may be called an ex post facto extension by acceptance of the payment when it is tendered. It may be said that the acceptance of the payment on 28th April may have led the plaintiff to believe that the defendant did not intend to insist on the express terms of the contract; but, in view of the special circumstances in regard to the notes falling due to Bennett & Ross, which I have already mentioned, I do not think that the plaintiff was entitled to make any such inference with respect to the succeeding instalment. The contract is very specific. The plaintiff is a real estate agent, and, no doubt, has taken dozens of such contracts from purchasers. He must have known clearly what the clause meant, and I cannot find anything in the facts to justify an assumption on his part that the defendant did not mean to insist upon the rights which the clause gave him.

With respect to the offer to convey on receipt of an extra $100, there is no doubt that this offer simply shews more clearly that the defendant was insisting on his rights and did not propose to give them up unless paid for doing so. The defendant acted with fair promptness when the default was made. Only 8 days later he mailed the notice declaring the agreement cancelled, and I think he was entitled to take that position. For these reasons I think the contract became null and void according to its terms when the plaintiff defaulted on 18th July, and that the plaintiff is, therefore, not entitled to have the contract specifically performed.

With regard to the moneys which have been paid to the defendant, namely, the sum of $650, counsel for the defendant practically admitted that the defendant would not be entitled to retain these. I think this is the right position to take, but it is by no means so clear as we were disposed to think it was when the matter was discussed at the trial. In Forfar v. Sage, McGuire, C.J., held the contrary, and he relied upon three cases in Ontario. In tracing these cases back, however, to their sources, I find that the well known principle in regard to the deposit which was laid down in Howe v. Smith, 27 Ch. D. 89, was extended so as to apply to subsequent instalments, although there is a remark of Boyd, C., in one of the cases—Fraser v. Ryan, 24 A. R. at p. 445—which would seems to shew that such an extension of the principle of Howe v. Smith is not proper. I prefer to rely upon the principle laid down in Cornwall v. Henson, [1900] 2 Ch. 298, where Webster, M.R., said: "I feel very grave doubt whether the doctrine of Howe v. Smith would apply to a case in which the purchase money was to be paid in instalments;" and where Collins, L.J., said: "Indeed, if the contract had contained an express stipulation that on the non-payment of any instalment the purchaser should forfeit all the instalments which he had previously paid, I think the Court would have regarded that provision as a penalty and would have relieved him from it, as was done in Re Dagenham (Thames) Dock Co."

In this latter case, which is reported in L. R. 8 Ch. 1022. Mellish, L.J., said: "I have always understood that where there is a stipulation that if on a certain day an agreement remains either wholly or in any part unperformed—in which case the real damage may be either very large or very trifling

—there is to be a certain forfeiture incurred, that stipulation is to be treated in the nature of a penalty. Here, when you look at the last agreement, it provides that if the whole $2,000, with interest or any part of it, however small, remains unpaid after a certain day, then the company shall forfeit the land and the portion of the purchase money which they have paid. It appears to me that this is clearly in the nature of a penalty from which the Court will relieve."

No doubt, if the defendant could have shewn any damages resulting from the default of the plaintiff, he would have been entitled to have these deducted from the amount still in his hands; but, as it appeared in evidence that the property is now worth two or three times as much as it was at the time of the default, and as the defendant's real reason for defending the action is beyond question because he wishes to make a better sale of the property than that entered into with the plaintiff, it seems to me that the defendant has clearly suffered no damage whatever, but will be in a better position than he would have been if the plaintiff had carried out his bargain. If the default of the plaintiff had been of such a nature as to shew that he intended to repudiate the contract, it might have been a question whether he could then have claimed a return of the money paid; but it was quite evident that he always intended, if he could, to carry out the contract, and would have done so if the defendant had not insisted upon the rescission provided for by the contract itself.

The result is that the plaintiff's action will be dismissed with costs, but no order will be made vacating the caveat until the defendant has paid into Court the sum of $650 to the credit of this action, which amount, less the taxed costs of the defendant, will be paid out to the plaintiff, and the amount of the costs repaid to the defendant, or, if the parties wish, the taxation may take place first, and the defendant may pay into Court the sum of $650, less the amount certified for costs. Upon this being done, there will be an order vacating the caveat.

NORTH-WEST PROVINCES.

(CALGARY.)

STUART, J. JULY 20TH, 1907.

CHAMBERS.

RE SPRUCE VALE SCHOOL DISTRICT No. 209 AND CANADIAN PACIFIC R. W. CO.

Assessment and Taxes—School Taxes—Exemption—Canadian Pacific Railway Company—Lands in 24-mile Belt Granted to Company, still Unsold and Unoccupied—Constitutional Law—School Assessment Ordinance, N.W.T. —Effect of, after Establishment of New Province by Alberta Act—Period of Exemption—Crown—Trust—Land Subsidy—Time for Making Land Grant.

The Canadain Pacific Railway Company, the owners of part of the south-east quarter of section 7 in township 24 in range 1, west of the 5th principal meridian, and also part of section 17 in the same township, were assessed in respect of these lands by the assessor of the Spruce Vale School District No. 209, within which district the lands were situated. The company appealed to the Court of Revision, which confirmed the assessment, and from that decision the company now appealed.

W. P. Taylor, for the appellants.

F. S. Selwood, for the respondents.

STUART, J.:—It was admitted: (1) that the assessor had assessed the appellants in respect of the land for the year 1907; (2) that the land described is part of the original grant made to the appellants under and by virtue of the contract referred to in and confirmed by 44 Vict. ch. 1 (D.), and that it is within the 24-mile belt referred to in the said contract; (3) that the patent for the lands in question was issued by the Crown to the appellants on 1st July, 1901; and (4) that the lands have not yet been sold by the appellants and have not yet been occupied.

There was no admission made as to the date of the completion of the railway as referred to in sec. 9 (b) of the contract, but evidence was tendered which satisfied me that the whole railway referred to in the contract was completed according to the terms of the sub-section some time in the year 1886.

The appellants relied upon the two following cases, viz., Balgonie Protestant School v. Canadian Pacific R. W. Co., 5 Terr. L. R. 123, and Spring Dale School District v. Canadian Pacific R. W. Co., 35 S. C. R. 550. The only possible change in the situation which might conceivably be held to have taken place since the latter case was decided by the Supreme Court of Canada, arises from the fact that since the date of that case the North-West Territories as they then existed have disappeared, and two provinces of confederation have been established, covering practically the same geographical area. A large portion of the reasoning upon which the decision in that case was based was referable to the fact that taxation by the Territorial Legislative Assembly being imposed by a delegated legislative authority, was really taxation by the Dominion. Had it not been for the clause in the Alberta Act to which I shall presently refer, it might conceivably have been possible to argue that now that a new province has been created, which was not a party to the contract, the contract could not bind such province; that, as the Provincial Legislative Assembly has permitted the School Assessment Ordinance of 1901, under which the assessment was made, to remain in force without interference, the legislation, although originally territorial legislation, has now become in reality provincial legislation and is a provincial law—that, therefore, the province has in that sense legislated, and that, the contract not being binding upon it, the exemption imposed by the Dominion Act confirming the contract can no longer exist. I doubt, however, very much whether the effect of sec. 16 of the Alberta Act establishing the province, whereby all laws in force in the Territories are continued in force subject to being altered, amended, or repealed by the Dominion Parliament or the Provincial Assembly, according to their respective authorities, is sufficient to convert the Assessment Ordinance into a piece of provincial legislation. It is unnecessary, however, to say anything as to this, because sec. 24 of the Alberta Act, establishing the constitution of the province, expressly provides

that the powers granted to the province must be exercised subject to the provisions of sec. 16 of the contract, which provides for the exemption. Section 24 of the Act establishing the province, therefore, it appears to me, effectually prevents the province from saying at any time hereafter that it is not bound by the contract.

There remains, therefore, the simple question whether the period for exemption from taxation has yet expired. On this point I am, of course, absolutely precluded by the authority of the Spring Dale case from giving any but one decision, which is, that the period of exemption did not begin to run until the issue of the patent on 1st July, 1901, and, the 20 years not having expired, that the land in question is still exempt from taxation.

There was some intimation made that this case had been brought before me as a test case for the purpose of proceeding further, and, if possible, of securing a decision by the Privy Council which was not obtained in the Spring Dale case, owing, so it was stated, to delay in asking for leave to appeal. I cannot at present understand how this is expected to be done, inasmuch as no right of appeal from the Judge's decision is given by the provisions of the School Assessment Ordinance. In the Spring Dale case there was, not an appeal upon the assessment, but a regular action in Court to recover the taxes as a debt from the company, in which case, of course, an appeal could go on. If I allow this appeal, as I am bound to do, there will be no assessment, and therefore no action can be brought for the taxes which could be taken to appeal. It may be, however, that the parties may have some method of going on in mind which does not now occur to me, and in view of that possibility I think it not altogether out of place to mention one possible aspect of the case which was not, so far as I can discover, suggested in the argument of the previous cases. The public lands of the Territories are vested in the Crown in the right of the Dominion of Canada. The beneficial interest is not in the Crown but only the bare legal estate. The Crown is, therefore, a trustee for the Dominion of Canada and for the people inhabiting it in respect of these lands. This was the situation in 1880, when the contract was made, and in 1881, when it was confirmed by Parliament. Section 9 (b) of the contract says: "Upon the construction of

any portion of the railway hereby contracted for, not less than 20 miles in length, and the completion thereof so as to admit of the running of regular trains thereon together with such equipment thereof as shall be required for traffic thereon, the Government shall pay and grant to the company the money and lands subsidies applicable thereto. . . ." There is no doubt that under this clause, as soon as every 20 miles was completed, it became the duty of "the Government," which, of course, means the Crown, to "grant" the land subsidy applicable thereto. The company at least could have then called upon the Crown to do so. The question then arises whether any person or persons other than the company were entitled, not in a political sense but in a legal sense, to call upon the Government then to make the grant.

The Crown was a trustee. Was there any beneficiary with legal rights recognizable by the Courts? Assume for the moment a parallel case. John Smith holds the fee simple in 500,000 acres of land as bare trustee for a number of beneficiaries. For the benefit of the latter and by their authority, he enters into a contract with Richard Brown, whereby, in consideration of the latter constructing an irrigation ditch through this tract of land, it is agreed that Brown is to receive 50,000 acres as a bonus, and that Smith shall grant these lands to Brown as soon as the work is completed. It is also agreed that, commencing at a period 20 years after Smith grants these lands to Brown, the beneficiaries shall be entitled in perpetuity to 2 per cent. of all revenues received from the subsequent purchasers of the lands for water privileges. The bonus is earned by the construction of the work, but Smith, the bare trustee, does not make the grant to Brown until some years afterwards, instead of at once, as the contract provides. As a result the time at which the beneficiaries are to begin to receive their percentage of the revenues is postponed. It appears to me that in such a case a court of equity would, in order to protect the beneficiaries, declare that that must be held to have been done which should have been done, and would hold that the 20 years should be held to have commenced to run at the moment when Brown became entitled to receive his deeds of grant, and when he should have received them. Could any such doctrine be applied where the Crown is the trustee? There is no doubt that the Crown can be a trustee. The only doubt has been on the point as to whe-

ther there can be any remedy applied. It will be observed, however, that there would be no necessity to proceed against the Crown in any way. All that would be necessary would be for the Court, which represents the Crown as to its judicial functions, to declare that the Crown in its administrative capacity had not done what it should have done, and, in order to prevent the interests of the beneficiaries being injured, that that must be held to have been done which should have been done, that is, that the grants or patents must be held to have been issued when they should have been issued; or, in other words, that the 20-year period of exemption must be held to have commenced when it would have commenced if the contract had been performed according to its terms by the parties to it, one of whom was a bare trustee for other parties whose interests were injured by the delay. The doubt, of course, suggests itself whether the Court would consider the rights of any beneficiaries who could not be made parties to a proceeding in Court, and whether this line of reasoning does not lead us quite beyond the boundary between law and politics. In any case, there would still be the question whether the arguments used by Nesbitt, J., in his judgment in the Spring Dale case, in reference to the speculative character and the difficulties of the company's enterprise, as well as the difficulties of making a selection of the lands to be accepted, would not be sufficient to make the time at which the patent should have been issued so doubtful as to prevent the Court from arriving at any definite conclusion on the point, and therefore from saying that the period of exemption should be computed from any definite time other than the date of the patent.

As to the second point raised by the appellants, viz., that the statute extending the boundaries of the city of Calgary has established a further exemption, it is not necessary to deal with that question in view of my decision on the other point.

The appeal will, therefore, be allowed and the assessment roll will be amended by striking out the assessment of the company in respect of the land in question. As the assessment was made in the face of a well known decision shewing its invalidity, I think the appellants should get their costs of the appeal.

NORTH-WEST PROVINCES.

(CALGARY.)

STUART, J. JULY 23RD, 1907.

TRIAL.

NIMMONS v. GILBERT.

Landlord and Tenant—Lease of Land for Quarry—Covenant by Lessees not to Employ more than 10 Men in Quarry—Oral Evidence to Vary Lease—Rejection of—Weight of Evidence—Remedy for Breach—Injunction — Construction of Negative Covenant—Damages.

Action by Isabelle Nimmons against William Gilbert and John Bone for damages for breach of covenant in a lease and to restrain defendants from making further breach.

James Short, K.C., and W. T. D. Lathwell, for plaintiff.

W. F. W. Lent and S. L. Jones, for defendants.

STUART, J.:—On 1st April, 1906, plaintiff, who is the owner of the north-west quarter of section 8 in township 24 in range 1, west of the 5th meridian, granted a lease of a portion of the lands to the defendants to be used as a stone quarry. The lease was to run for 4 years, and the rental fixed was $47 per month. The lease contained the following clause: "And the said lessees hereby covenant with the said lessor that they will not, without leave, assign or sublet, nor put more than 10 men in the quarry without the lessor's consent." In December, 1906, some negotiations took place between the defendants and the plaintiff's husband, which had in view a more extensive operation of the quarry. Early in January the defendants met the plaintiff at her home, and a discussion took place, at which the husband and some other members of the family were present. It had been proposed that the husband should put more money into the enterprise, and become a partner in the defendants' firm, and the discussion was chiefly in regard to the amount of money that would be required to secure the necessary machinery and to operate the quarry on the more extensive scale proposed.

There was also something said about the increased rental that the plaintiff would expect.

After considerable talk, the exact substance of which forms the chief matter of dispute in this action, the plaintiff signed in duplicate the following memorandum, which had been written by her daughter, at her husband's dictation: "I, the undersigned, agree to lease the quarry to Gilbert & Bone, or any other partner they may take it (sic), at $55 per month, for the balance of the two years, with the option of two years more, at a rent not more than $75 per month. Mrs. Isabelie Nimmons."

One copy of this memorandum was handed to the defendants, and was taken away by them, but the purpose for which it was handed over is disputed. After some short further conversation, the defendants left. Some days afterwards the plaintiff's husband wrote a letter to the defendants, stating that he had made up his mind "to withdraw from this quarry affair altogether." Defendants did not reply, but proceeded to enter into negotiations with one Oliver, who resided in Ontario, with a view to securing more funds for the operation of the quarry. Finally Oliver came to Calgary, and entered into a partnership agreement with defendants, and put into the partnership about $2,600 in the form of plant and machinery. The new partnership proceeded to operate the quarry without regard to the limitation as to the number of men. When the April rent came to be paid, the defendants tendered the sum of $55, which was refused by plaintiff, on the ground that no new agreement had ever been made, and that the old rental was still all that was due. Finally plaintiff began this action on 4th June, 1907, claiming the sum of $141 for rent for the months of April, May, and June, and also asking for an injunction restraining the defendants from employing or working in the said quarry a number of men greater than 10, as provided in the lease. The defendants plead that at the meeting in January a new agreement was made whereby all restrictions as to the number of men to be employed were removed, and the defendants were to be at liberty to put in more machinery to operate the quarry on a large scale, and in return for these concessions were to pay the increased rental of $55 per month. It was attempted to prove this alleged agreement by oral evidence, this being necessary because the memorandum which was taken away by the

defendants did not refer to the removal of the restriction in any way.

The evidence was objected to by the plaintiff, and was taken subject to the objection. In itself, the evidence was extremely contradictory, and I am very glad that I am relieved from the necessity of making any definite finding as to the real facts as they occurred at the interview in question. The evidence, in my opinion, is all inadmissible. The Statute of Frauds requires a lease for a term exceeding 3 years to be in writing, and this is also the rule laid down by our Land Titles Act. The lease in question was not only in writing, but it was under seal.

Phipson on Evidence, 4th ed., p. 542, says: "A contract, however, required by the Statute of Frauds to be in writing, though it may be wholly rescinded by a valid oral agreement, cannot be partially abandoned or varied thereby." Taylor on Evidence, 9th ed., para. 1144, says: "But, whatever may be the effect of an oral dissolution of the whole of a statutory contract, no verbal agreement to abandon it in part or to add to or modify its terms, can be recieved."

The rule is, doubtless, different where there is no statutory requirement, at any rate if the contract is not under seal. Where the contract is under seal, as in this case, there is still a doubt seemingly on the point whether oral evidence of a subsequent variation, as distinguished from a total rescission, is admissible: Phipson, p. 542; Taylor, para. 1141.

The only remaining doubt I had was whether there might not be an exception in equity in favour of the defendants, resisting specific performance of the original agreement on the ground of subsequent oral variations, but the cases of Price v. Dyer, 17 Ves. 356, and Robinson v. Page, 3 Russ. 121, cited and followed in Vezey v. Rashleigh, [1904] 1 Ch. 636, shew that this is not the case. Plaintiff is entitled, therefore, to rely on the original lease, and, unless precluded by any equitable principle applicable to the granting of injunctions, to insist that it shall be specifically performed according to its terms.

But, before turning to the question of the injunction, I think it best to say that there would have been no practical difference in the result had I been forced to consider and weigh the oral testimony; not that I would have believed entirely the evidence for the plaintiff, and disbelieved the defendants' testimony; but the evidence was so absolutely contradictory, and yet all the parties were so evidently speak-

ing as they believed honestly as to what occurred, that it would have been impossible for me to find as a fact that a new agreement had been made rescinding the restriction as to the number of men. There was clearly a very grave misunderstanding between the parties, as well as a very grave misapprehension on the part of the defendants as to the legal effect of the memorandum which they took away with them, assuming that that memorandum was really as a matter of law delivered. It is difficult to understand how the defendants could have rested satisfied with a document which makes not the slightest mention whatever of the very circumstances connected with the original lease which were of the greatest importance to them as far as their larger schemes were concerned.

It was suggested that if I found that the memorandum was really delivered, the Court would be entitled to infer from the peculiar wording of this that there had been an agreement made to rescind the restriction, because there was no other apparent consideration for the increase of rental, There might, however, be many reasons for an increase in rental. If the memorandum were first presented to the Court as it stands, the question would immediately occur, "Why was the rent increased?" In order to get an answer to that question oral evidence was necessary, and, that being so, and the rule being as I have stated, defendants must fail.

When I come, however, to consider plaintiff's remedy, I have had really more difficulty than under the question of evidence, and yet the matter was not referred to in argument at all. It was apparently assumed that plaintiff would be entitled to an injunction if defendants failed to establish the facts alleged by them, but I am bound to say that, were it not for the fact that the covenant in the lease is a negative one, I should almost certainly have refused an injunction, and should have left plaintiff to her remedy at law for damages. The granting of an injunction is generally discretionary, and where the damage is small, or where the right is not absolutely clear, or where there would be difficulty in enforcing the injunction, the Court may in its discretion refuse the equitable remedy. In this case the damage is, I think, very small. Plaintiff was, I think, willing to let the defendants do what they pleased in the quarry for $55 per month if her husband became a partner with them. Several independent and absolutely reliable witnesses

acquainted with the quarry business declared that $50 per month was quite a sufficient rental for the quarry in question, even where no restriction existed. The plaintiff succeeds mainly upon the admissibility of the evidence, while a consideration of the oral testimony excluded leaves us in very grave doubt to what really did occur between the parties. There was certainly some carelessness on the part of plaintiff and her husband in allowing the defendants to take the memorandum from their house if it had not, as they assert, been in fact delivered. They could easily have prevented its removal, it appears to me, and, had they done so, defendants would have clearly had no ground for misapprehension. Of course the document does not mention the removal of the restriction, and, as I have said, it is rather extraordinary that defendants should have placed so much reliance upon it, but, if they really believed that it had been fully delivered to them, they, perhaps naturally, thought that it must mean something. Had the covenant, therefore, not been a negative one, I should for these reasons have refused the injunction. But I am controlled by authority. In Dogherty v. Alman, 3 App. Cas. 720, Lord Cairns said: "If there is a negative covenant, the Court has no discretion to exercise. If parties, for a valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a court of equity has to do is to say by way of injunction that the thing shall not be done. In such a case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or injury, it is the specific performance by the Court of that negative bargain which the parties have made, with their eyes open, between themselves." See also McEachren v. Colton, [1902] A. C. 104. This being the rule, I have, I think, no alternative except to grant the injunction asked for. The only question remaining is as to its terms. The covenant is "not to put more than 10 men in the quarry without the lessor's consent." For a time I thought that was too uncertain a clause, and perhaps too difficult to interpret, and when interpreted too difficult to enforce, to justify the granting of an injunction. But, on consideration, I think the meaning is plain. It means, to my mind, that the lessees must not employ in the quarry at any time more than 10 men, whose employment is entirely within

the quarry. Men who are engaged in passing to and from the quarry in the delivery of stone are not to be included. There will, therefore, be an injunction in these terms.

Plaintiff is also entitled to some damages. The operations began on the larger scale shortly after 1st May. The interruption by the interim injunction which was dissolved lasted but a week or 10 days, if I remember correctly. I think I may assume that when the interim injunction was dissolved defendants began again to employ the larger number of men. It is now 23rd July. There was no definite evidence as to damages, and I think, in view of the evidence as to rental value, that if I allow an additional rental at the rate mentioned in the memorandum, substantial justice will be done. I will allow, therefore, $16 for damages to date. There will therefore be judgment against defendants for this sum, and for $141, three months' rental for April, May. and June, at the rate specified in the lease, in all, $157; and for the costs of the action, including the costs of the interim injunction, and the application to dissolve it.

NORTH-WEST PROVINCES.

(WESTERN ASSINIBOIA.)

NEWLANDS. J. JULY 24TH, 1907.

TRIAL.

OSLER v. COLTART.

Assessment and Taxes—School Taxes—Exemption—Crown Lands — Homestead—Cancelled Entries—Rural School District—Interest of Homesteader — Liability of Subsequent Homesteader—Lien on Land.

Action to recover from the defendants, as the trustees of Prospect School district No. 560, $23 which they collected from plaintiff for school taxes and bailiff's fees, by distress of his goods and chattels.

W. M. Kellock. Weyburn, for plaintiff.

F. Ford, Regina, for the Attorney-General, intervening.

NEWLANDS, J.:—In this case the defendants are sued as the trustees of Prospect school district No. 560 for $23 taxes and bailiff's fees, which they collected from plaintiff by distress of his goods and chattels. These taxes were assessed on plaintiff's homestead prior to entry by him, and while the same was held by previous homesteaders, whose entries were afterwards cancelled. No patent has yet been issued for this land.

It is contended on behalf of the defendants that all land in rural school districts (the district above mentioned being a rural school district) is taxable, including land held by the Crown. This contention is based on the fact that the School Assessment Ordinance does not exempt Crown lands in the case of rural school districts, while it exempts Crown lands in every other instance. To shew the fallacy of this argument, I have only to point out that sec. 125 of the British North America Act provides that no land or property belonging to Canada or any province shall be liable to taxation.

After the parties had argued this case, and I had come to the above conclusion, the Attorney-General for the province intervened, and the case was reargued.

Mr. Ford, for the Attorney-General, argued that there could be no doubt but that the interest of the homesteader could be assessed, though until patent was issued by the Crown that interest could not be sold; that the tax on the interest of a homesteader, although it would be in the nature of a personal tax, would also have some of the incidents of a tax on land, and would become a lien on the land, for which the land could be sold after the Crown parted with their title to it; that this tax having been properly levied at the time against the interest of the homesteader in the land, it could be collected from the occupant of the land in any of the methods prescribed by the Ordinance, except the sale of the land itself, before the issue of the patent; and that the tax in this case was collected by distress of goods on this land for a tax that had been properly levied on the interest of a previous occupant.

I cannot see that this argument, however ingenious it may be, answers the objection that land belonging to Canada is thereby taxed. It is true that the interest of the occupant only was assessed, but, if the tax becomes a lien on the land realizable from a subsequent occupant who de-

rives his title from the Crown, I cannot see but that the property of the Crown has been taxed.

A subsequent homesteader or purchaser would have to take into consideration the lien for taxes that was against the land, and, if a purchaser, would give that much less for the land, which would mean that the Crown paid the taxes.

I think that the land is absolutely free from the tax in the hands of the Crown, and it cannot be revived on the Crown alienating the land to a private individual.

It therefore follows that, the land not being liable to taxation while belonging to the Crown, it could not be charged with taxes levied against the interest of the former homesteaders whose entries were cancelled, and whose interest reverted to the Crown, before the plaintiff went into possession, and the school district would, therefore, have no right to recover the same from the plaintiff.

Judgment will therefore be for the plaintiff for the amount claimed with costs.

NORTH-WEST PROVINCES.

(EASTERN ASSINIBOIA.)

WETMORE, J. AUGUST 3RD, 1907.

CHAMBERS.

DANIEL v. CANADIAN PACIFIC R. W. CO.

Pleading—Statement of Defence—Leave to Plead other Defences with "Not Guilty by Statute"—Railway—Injury to Animals on Track — Railway Act—Cattle Guards—Negligence—Contributory Negligence.

In an action to recover damages for the alleged killing of or injury to the plaintiff's horses by one of the defendants trains, the defendants applied for leave to plead other defences with that of not guilty by statute.

The proposed matters of defence other than not guilty by statute were as follows:—

"2. The defendants deny each and every material allegation contained in paragraphs 1, 2, 3, 4, and 5 of the plaintiff's statement of claim.

"3. The defendants say that the horses mentioned in the plaintiff's statement of claim were not the property of the plaintiff.

"4. The defendants say that the horses mentioned in paragraph 3 of the plaintiff's statement of claim got at large through the negligence or wilful act or omission of the owner of the said horses or his agent or of the custodian of the said horses or his agent.

"5. The defendants further say that the said horses were permitted to be at large upon a highway within half a mile of the intersection of such highway with the railway at rail level, and that the said horses were not in charge of any competent person or persons to prevent their loitering or stopping on such highway at such intersection, or straying upon the railway.

"6. The defendants say that the said horses did not get upon the property of the defendants at the point of intersection of a highway crossing at rail level with the railway, as mentioned in paragraph 4 of the plaintiff's statement of claim.

"7. The defendants further say that if there were no cattle guards as alleged in paragraph 4 of the plaintiff's statement of claim, which the defendants do not admit but deny, there was no duty, statutory or otherwise, on the part of the defendants to erect or maintain such cattle guards.

"8. The defendants say that the said horses were not worth $650, as mentioned in paragraph 6 of the plaintiff's statement of claim.

"9. The defendants will object to the plaintiff's statement of claim as bad in law because the plaintiff has shewn no cause of action entitling him to relief in this honourable Court, or any right to maintain this action against the defendants."

E. A. C. McLorg, Moosomin, for defendants.

J. T. Brown, Moosomin, for plaintiff.

WETMORE, J.:—The defence proposed in the second paragraph is bad. I am of opinion that what I laid down in Smith v. Canadian Pacific R. W. Co., 21 C. L. T. Occ. N. 193, was well decided, and I have no reason to alter my opinion as stated in that case. I may add, however, that some of the allegations in this paragraph appear to me to be immaterial; for instance, the first paragraph of the state-

ment of claim simply states that the plaintiff resides at Moosomin, in the province of Saskatchewan. It is a mere matter of description and is not material to the question involved in the case. Paragraph 2 of the claim merely alleges that the defendants owned and operated a railway extending through Moosomin, which is a self-evident fact. Why the defendants wanted to deny those allegations I cannot conceive. The paragraph in question, however, is slightly different from the corresponding paragraph in Smith v. Canadian Pacific R. W. Co. In that case the denial was as to each and every material allegation contained in the statement of claim. In this case it will be observed it is a denial of every material allegation contained in certain specified paragraphs of t' e statement of claim. That might make an important distinction. It is not necessary for me to decide that, however, because the allegation is that they deny each and every material allegation contained in these paragraphs, leaving the matter all abroad as to what are and what are not material allegations, with respect to which there may be a very considerable difference of opinion. I dealt with that matter in Smith v. Canadian Pacific R. W. Co. I am of opinion that this paragraph ought not to be allowed.

The 3rd paragraph is not objected to.

It is argued as regards the 4th paragraph that this is merely a plea of contributory negligence, and that contributory negligence can be given in evidence under the plea of not guilty by statute, as held by me in Smith v. Canadian Pacific R. W. Co. I am inclined to think that this paragraph does practically plead contributory negligence. There is also a distinction between this plea and that of contributory negligence pleaded in Smith v. Canadian Pacific R. W. Co. In that case the plea was of contributory negligence generally, without specifying what it was. In the present case the plea specifies the particular negligence complained of. I am of opinion that under such circumstances it would be advisable to allow the paragraph to be pleaded. The plaintiff cannot complain of it, because it apprises him of what the defendants intend to set up, and he cannot be taken by surprise. I have come to the conclusion therefore to allow this paragraph to be pleaded.

Although possibly it may not afford a good defence to this action, on the other hand, in view of the alleged act of negligence on the part of the defendants set out in the state-

ment of claim, namely, not having cattle guards, it may. I will allow the defendants to raise the question.

As to the 5th paragraph, it is contended, first, that it is no answer to the action, and, second, that it would be available under the plea of not guilty by statute. As to it not being an answer to the action, I am not prepared to say that it is not, nor do I think that I ought to decide that on this application. I am of opinion under sec. 294 of the Railway Act, R. S. C. 1906 ch. 37, that the defence is of such a character that the defendants ought to be allowed to raise it, and I go no further. I express no opinion whatever as to the validity of the defence. If it was clearly and unquestionably bad, of course, I think I ought not to allow it to be pleaded, but the matter is not so clear as to warrant me in refusing leave. As to the matter being available under the plea of not guilty by statute, I am inclined to the opinion that it would be available, but I think the matter is one in which I ought to pursue the same course that I did with respect to paragraph 4.

No objection is taken to the 6th paragraph.

As to paragraph 7, it is contended that what is alleged there is not correct. I will, however, allow that to be pleaded.

Paragraph 8 is entirely useless and will be struck out.

Paragraph 9 will also be struck out, for the reasons stated by me in Smith v. Canadian Pacific R. W. Co., at p. 200.

NORTH-WEST PROVINCES.

(EASTERN ASSINIBOIA.)

WETMORE, J. AUGUST 7TH, 1907.

CHAMBERS.

WATEROUS ENGINE WORKS CO. v. HOWLAND.

Parties—Misjoinder of Defendants—Separate Causes of Action—Contracts—Sale of Goods — Promissory Notes—Election.

The statement of claim in the first three paragraphs alleged, in substance, that by an agreement under seal dated

23rd April, 1906, the defendant Howland agreed to purchase from the plaintiffs a 20-horse power, second-hand traction engine, for which he agreed to pay the plaintiffs on 1st December, 1906, $500, and on 1st December, 1907, a like sum of $500, and to secure the payment of these amounts he gave the plaintiffs his two promissory notes dated 24th April, 1906, for $500 each, with interest as stated, and payable respectively 1st December, 1906, and 1st December, 1907; that it was agreed in such agreement, among other things, that on default of payment of any obligations given for this machinery the whole of the purchase price remaining unpaid, or any obligations therefor, should become due and payable as cash, notwithstanding the deferrred times of payment mentioned in the obligation; that the defendant Howland covenanted to pay the same; that the plaintiffs had delivered the engine, and the defendant Howland had paid nothing on account of the purchase price or of the promissory notes. By the 4th, 5th, 6th, and 7th paragraphs of the claim it was alleged that by an agreement under seal dated 18th May, 1906, the defendant Howland agreed to purchase from the plaintiffs a 26-horse power Waterous double-cylinder engine; one 40 x 60 McClosky Thresher, with side-fan blower; one 40 Rich band-cutter and self-feeder, 150 feet of 8-inch, four-ply drive belt, one B. D. Moore steam pump, and one head-light, for the price of $4,080, which was to be paid for by delivering to the plaintiffs one 20-horse power Case engine, free of all liens, at $950, and the balance by promissory notes payable as follows: two notes for $1,050 each, payable respectively on 1st November, 1906 and 1907, and one note for $1,030 payable on 1st November, 1908, bearing interest as stated; that the machinery mentioned in the last mentioned agreement was delivered by the plaintiffs to the defendant Howland, and they received the 20-horse power Case engine, and also received the following promissory notes made by the defendants the Saskatchewan Mutual Development Company in favour of the plaintiffs, namely: one dated 26th May, 1906, payable 1st November, 1906, for $1,050, with interest as stated; one for $550, dated 28th May, 1906, and payable on 1st November, 1907, with interest as stated: one dated 22nd August, 1906, payable 1st November, 1907, for $500. with interest as stated; and one dated 22nd August, 1906, payable 1st November, 1906, for $1,030, with interest as stated. And the claim alleged that the last mentioned agree-

ment provided that, if default should happen in payment of the purchase price of the machinery, the whole of the purchase price remaining unpaid, and all obligations therefor, should, notwithstanding the deferred times of payment mentioned in such obligations, become due and payable as cash forthwith; and it alleged that nothing had been paid on account of this last mentioned agreement or the notes. The 8th paragraph contains a claim against the defendants the Saskatchewan Mutual Development Company (hereinafter called "the company") for goods sold and delivered, to the amount of $27.23. And the plaintiffs in their prayer for relief claimed from the defendant Howland the sum of $4,200.30, and interest from 1st December, 1906, and judgment against the company for $3,185.83, with interest; that is, the plaintiffs asked to recover against the defendant Howland the principal and interest on all the promissory notes set out in the statement of claim, and as against the defendant company the principal and interest due on the notes made by them, and also for the goods alleged to be sold and delivered to them.

This application was made on behalf of the company to strike their name off, on the ground that the claim against them could not be joined in one action with the claim against the defendant Howland.

T. D. Brown, Moosomin, for the defendant company.

E. L. Elwood, Moosomin, for plaintiffs.

WETMORE, J.:—It is set up in the first place on the part of the plaintiffs that the company had waived their right to take this objection by reason of their advocate having applied for and obtained an extension of time for putting in a defence. I am of opinion that this contention cannot be allowed; the matter complained of here is not a mere matter of irregularity; the question is whether the plaintiffs have the right to mix these parties up in the way they have done in bringing this action. The question really is, then, whether the plaintiffs had a right to join these parties in this action under Rule 29 of the Judicature Ordinance. That Rule is as follows: "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative; and judgment may be given against such one or more of the defendants as may be found to be liable according to their respec-

tive liabilities without any amendment." This Rule is word for word the same as Order XVI., Rule 4, of the English Rules, and the authorities are to the effect that this Rule and Rule 1 of Order XVI. should be read one into the other. This last mentioned Rule, before it was amended in October, 1896, was precisely the same as Rule 26 of the Julicature Ordinance. Whatever my opinion might have been as to the construction to be put upon Rule 29 of the Judicature Ordinance, I feel that I am bound by authorities which I must follow. The cases to which I refer were decided in the House of Lords, and, although a decision of that Court is not binding upon the Court of which I am a member or upon myself, their decisions are of such a high character (because it is the supreme court of appeal in England) that I would not for a moment venture to go contrary to them. It will be observed that the causes of action set forth in the 1st, 2nd, and 3rd paragraphs of the statement of claim are really against the defendant Howland; the company are in nowise interested or concerned in them at all; and, on the other hand, the cause of action set forth in the 8th paragraph is entirely against the defendant company, and Howland has no interest whatever in that claim. I cannot therefore see how under the authorities these two defendants can be joined with respect to those causes of action, and at any rate so far as those causes are concerned the defendants are entitled to succeed or the plaintiffs called upon to elect which causes of action they will proceed with. As to the causes of action set forth in the 4th, 5th, and 6th paragraphs, it will be observed that the notes which were provided by the agreement of 18th May to be given for this machinery were not the notes specified in the claim, as given; these notes were payable at a different time and for different sums, and made by other persons; it will be observed that the gross amounts are the same, but that is all. It does not appear that the defendant Howland was a party to these notes that were actually given for the machinery, and how it is expected to make him liable on the notes given by the defendant company, I am unable to conceive. It may be set up possibly that Howland is liable, not on the notes given by the defendant company, but under the agreement for the purchase price of the machinery, and, especially, in view of the acceleration clause. I do not consider it necessary to express any opinion upon this question, and as a matter of fact I have formed no opinion; but, if Howland is so liable, he is liable by virtue of the agree-

ment and not by virtue of the notes, and what liability there is on the part of the defendant company is by virtue of the notes and not by virtue of the agreement; that is, the plaintiffs have distinct and separate rights of action against these persons—one against the company by virtue of their notes, and not by virtue of the agreement, and one against Howland by virtue of the agreement and not by virtue of the notes. I may add that it is impossible that the company can be held subject to the acceleration clause in this agreement—an agreement which they were never parties to; and it is not alleged that they were parties to it. They promised to pay these notes at a specified date; that payment cannot be accelerated by an agreement between the plaintiffs and another person—an agreement to which they were not parties at all. In Smurthwaite v. Hannay, [1894] A. C. 494, it appeared that "bales of cotton were shipped by several shippers upon a general ship for carriage to Liverpool, the bills of lading being similar. Upon arrival it was found that the number of bales landed fell short of those shipped, and that some of the landed bales could not be identified, their marks having been obliterated. These latter bales were sold and their proceeds distributed proportionately among the several consignees. Sixteen holders of bills of lading, 9 being shippers and 7 consignees, joined in one action against the shipowners, claiming damages for non-delivery of the number of bales specified in their bills of lading respectively." The question was whether the several plaintiffs could be joined. The House of Lords held they could not. Lord Herschell, L.C., at p. 499, states as follows: "In what sense can it be said with accuracy that the different causes of action all arise out of the same transaction? The claim is in each case in respect of a breach of a separate contract to deliver the goods shipped." That is practically the case here, as I have already stated it. The claim is in each case in respect of a breach of separate contracts. Then at p. 500 he states: "The Rule provides that 'all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative.' This conveys to my mind the idea that the relief claimed by the plaintiffs who are joined is to be the same relief." Just at this stage his Lordship was dealing with Rule 1 of the Order, but at p. 501 he states: "It cannot be doubted that whatever construction is put upon the Rule I have been considering, must be applied equally to Rule 4 of the same Order."

Lord Russell of Killowen, at p. 503, states: "The property in the goods was distinct in the case of each shipper, and the contracts of carriage were likewise distinct. There was no community of interest or of property as between the plaintiffs. In truth, the transaction was not one and the same. There were several transactions, similar indeed, but different and distinct from one another." This last appears to me to be very pertinent to the question I am discussing in this case.

In Sadler v. Great Western R. W. Co., [1895] 2 Q. B. 688, "the plaintiff, a dealer in cycles, brought an action against two railway companies which had parcel offices adjoining his shop on opposite sides, alleging that each company caused carts to stand on the highway in front of its office for an unreasonable length of time, and that these combined acts prevented all access to his shop by vehicle or cycle, and caused him special inconvenience and loss of trade." An application was made by one of the companies to stay the action on the ground of misjoinder. The Court divided. A. L. Smith, L.J., holding that there was a misjoinder, and Rigby, L.J., holding the other way. Smith, L.J., at p. 693, states: "As I read Smurthwaite v. Hannay, [1894] A. C. 494, the question of the joinder of two plaintiffs equally applies to joinder of two defendants." This case was carried to appeal and was decided by the House of Lords in [1896] A. C. 450, and the judgment of Smith, L.J., was upheld. Halsbury, L.C., is reported at p. 453 as follows: "The pleader here has thought proper in some parts of the statement of claim to allege several and separate causes of action. He has set out in terms that the plaintiff has a separate cause of action against each of the two defendants. I believe the true construction of the whole statement of claim is that, and that the words which are to be found in the 5th paragraph do no more than expand, with a view to damages, what is referred to in the other paragraphs of the statement of claim." Lord Watson, at p. 454, states as follows: "It is perfectly obvious that the statement of claim for the appellant sets forth two separate and distinct causes of action against two separate defendants. I do not think that upon any fair construction of his pleadings there is set forth any joint claim against the defendants. In these circumstances it has been painfully apparent from first to last of the learned argument we have heard that the contention of the appellant is not only unsupported by authority, but is in the teeth of

authority." And Lord Herschell, at the same page, states: "My Lords, I am of the same opinion. It is practically admitted, for it cannot be disputed, that there are in the statement of claim two separate causes of action charged against these two defendants—that either of them might be sued alone, and that the plaintiffs here might recover against either of them alone."

I cannot distinguish this case from what is so laid down. This application must be allowed. It is alleged on the part of the plaintiffs by affidavits produced on their behalf that the defendant Howland is the manager of the defendant company, and that the agreements set out in the statement of claim and the promissory notes therein mentioned were executed by him on behalf of the company, and that the liability incurred by Howland is in reality the liability of the company. There is nothing in the statement of claim setting that up, and, in so far as the liability of the parties is concerned, I am inclined to think that it would not affect their rights as between the company and the plaintiffs under the claim as set up by the plaintiffs; but, however that may be, I am of opinion that it is not open to me to deal with that question, because the statement of claim sets up no rights against the company by virtue of any such relation or understanding. In disposing of this question I am of opinion that I cannot travel outside of what is set up in the statement of claim.

The counsel for the plaintiffs asked for leave, if I should rule against him, to elect. I will allow him to elect, and for that purpose will not make the formal order until 5th October.

NORTH-WEST PROVINCES.

(EASTERN ASSINIBOIA.)

WETMORE, J. AUGUST 9TH, 1907.

CHAMBERS.

MEARS v. ARCOLA WOOD WORKING CO.

Interpleader—Application by Garnishees — Remedy under Rule 392—Attachment Proceedings—Irregularity—Rules of Court—Discretion—Practice.

Motion by the Royal Insurance Company, garnishees, to make absolute an interpleader summons.

E. L. Elwood, Moosomin, for the Royal Insurance Company.

E. A. C. McLorg, Moosomin, for the plaintiff.

T. D. Brown, Moosomin, for the Independent Lumber Company and the defendants.

WETMORE, J.:—The plaintiff brought an action against the defendants for debt and issued a garnishee summons against the garnishees the Royal Insurance Company, which was duly served. The defendants effected an insurance upon a building in Arcola with the last mentioned company (hereinafter called the applicants). The building was destroyed by fire, and at the time of the service of the garnishee summons the appraisement of the loss had not been lodged with the applicants, and they consequently entered an appearance disputing the indebtedness. Since then the appraisement has been lodged, and they admit a liability under the policy of $2,000 to whomsoever the Court decides to be entitled to it. By the terms of the policy the loss, if any, was payable to the Merchants Bank of Canada, to the extent of their interest, and it is set up by the affidavit of Mr. Hogan, the manager of the applicants, upon which the Chambers summons was issued herein, that the Merchants Bank claim to be interested in this amount to the extent of $1,440. On 20th April last the defendants assigned all their right, title, and interest in the policy of insurance to the Independent Lumber Company, and Mr. Hogan asserts in his affidavit that demands have been made by the plaintiff, the Merchants Bank of Canada, and the Independent Lumber Company, under their claims, and the applicants fear that actions may be brought against them in respect thereof. They have, therefore, applied for and obtained an interpleader summons.

Objection was taken at the return of this summons that the applicants had no right in law to interplead; that their proceeding should be under Rule 392 of the Judicature Ordinance. That Rule is as follows: "Whenever it is suggested by the garnishee or any person claiming to be interested that the debt attached belongs to some third person or that any third person has a lien or charge upon it, the Judge may order such third person to appear and state the nature and particulars of his claim upon such debt." I am of opinion that this objection is well taken. This is not an inter-

pleader by a sheriff, and therefore in order to be well taken a party must bring himself within paragraph 1 of Rule 431, which is as follows: "Relief by way of interpleader may be granted where the person seeking relief is under any liability for any debt, money, goods, or chattels, for or in respect of which he is or expects to be sued by two or more parties making adverse claims thereto." Now, one of the parties interested in this matter is the plaintiff, and the applicants are as yet under no liability whatever to him for any debt of any sort. Therefore, there is no possibility that an action can be brought by the plaintiff against the applicants at present; he has not recovered a judgment—as a matter of fact the case is defended, and application has been made to set it down for trial. If the matter was merely between the applicants and the Merchants Bank and the lumber company, the case might be within paragraph 1 of Rule 431, but, in so far as the plaintiff is concerned, he is entirely outside of it, and I cannot see how the applicants can take advantage of that paragraph, in such circumstances. Rule 392 is especially in point, and proceedings under that Rule, taken with the following Rule (393), would effectually protect the applicants, and serve to bring all the parties interested before the Court. It has been stated that it is discretionary with the Judge to act under Rule 393; that is correct. It was so decided by the Court en banc at the last sittings at Regina, in April; but it is a discretion which a Judge has to exercise within reasonable limits; he has no discretion arbitrarily to refuse a proper application, and if a Judge did so he would be corrected upon appeal. It was urged that these garnishee proceedings were irregular in some respects. This is a matter in which one of the parties appearing at the return of the summons, namely, the Independent Lumber Company, is not concerned. The Arcola Wood Working Company might be concerned in the irregularity of the proceedings however; but I am of opinion that they cannot take advantage of such irregularity on this application. If they wish to attack the proceedings for irregularity, they must make a subsequent application. This application must be refused with costs to the parties so appearing, to be paid by the applicants.

NORTH-WEST PROVINCES.

(EASTERN ASSINIBOIA.)

WETMORE, J. AUGUST 15TH, 1907.

TRIAL.

AMERICAN-ABELL ENGINE AND THRESHER CO. v. SCOTT.

Sale of Goods—Action for Price—Construction of Contract—Several Articles of Machinery—Warranty—Divisible or Entire Contract—Right of Purchasers to Return whole Outfit on Failure of Goods to Answer Warranty—Time to Remedy Defects — Waiver — Notice — Computation—Rescission of Contract.

Action to recover the price of machinery.

Norman Mackenzie, KC., for plaintiffs.

J. T. Brown, K.C., for defendants.

WETMORE, J.:—The defendants by agreement in writing purchased from the plaintiffs one 22 h. p. simple traction engine, one 32 x 52 Toronto Comb separator, one Perfection elevator and waggon loader, one Parsons feeder, one tank pump and hose, 150 feet 8 x 4 ply belt, one lifting jack, one wire cable, and one American-Abell pneumatic stacker. The agreement of sale was drawn up on a printed form, the blanks where necessary being filled in by pencil. The price agreed to be paid for all this machinery was $3,500, and this amount was to be paid in 4 notes payable respectively on the 1st December in each year succeeding the date of the contract; each note to be for the amount as specified in the agreement. The machinery was delivered, but the agreed price was never paid either by note or otherwise, and this action was brought to recover the price of the machinery.

The agreement contained the following clauses:—

"It is mutually agreed and understood by and between the parties hereto, that this order and contract is separable and divisible, and that each machine, attachment, or article (sometimes hereinafter called 'the goods') is ordered, pur-

chased, and sold, each at a separate and agreed price, fixed above, and is included in the aggregate sum of all the goods so ordered, purchased, and sold, and that said goods are sold subject to the following express separate warranties and conditions, viz.:—

"The above machinery is warranted, with proper usage, to do as good work and to be of as good materials and as durable with proper care as any of the same class made in Canada. If the above machines will not bear the above warranty after a trial of one day, written notice shall be given to the company, and the agent from whom purchased, stating wherein it fails to satisfy the warranty, and reasonable time shall be given the company to send a competent person to remedy the difficulty or defect, the purchaser rendering necessary and friendly assistance. If the machinery cannot be made to fill the warranty it is to be immediately returned by the purchaser to the place where received, free of charge, and another substituted therefor, which shall fill the warranty, or the money and notes returned. Failure so to make such trial or to give such notices immediately thereafter, or to return the said goods, shall be conclusive evidence of the due fulfilment of this warranty by said company. When, at the request of the purchaser, a man is sent to operate the above machinery, which is found to have been carelessly or ignorantly handled, to its injury in doing good work, the expense incurred by the company in putting same in working order again shall be paid by said purchaser.

"No other remedy than the return of said machinery in the manner herein provided for, shall be had for any breach of warranty or warranties on this purchase.

"It is also agreed that no act or conduct on the part of any local or travelling agent or of any mechanical expert, whether in rendering assistance to operate said machinery, or attempting to remedy defects therein, shall be or constitute a waiver of any of the provisions hereof, or operate to extend the period of trial, and that no modification of this contract or waiver of its requirements on behalf of the company can be made by any person, other than a principal officer of the said company, and then only in writing."

The following was written in the margin: "These people are to have 10 days' trial before giving settlement for machise." It was conceded that the intention of this mar-

ginal insertion was to substitute a 10 days' trial for the one day mentioned in the warranty.

The engine and separator in question did not work satisfactorily, and all the machinery in question was returned to the place where received. It was contended under the warranty above set forth that the contract is separable and divisible, and that the defendants had no right to return all the articles sold, but only such as were not satisfactory and could not be made to work properly, and that they were bound to pay for what did work satisfactorily. I will dispose of that contention first. I am of opinion that this contention cannot be supported. The agreement provides that "this order and contract is separable and divisible, and that each machine, attachment, or article is ordered, purchased, and sold, each at a separate and agreed price, fixed above." This provision is one of the printed provisions of the contract, and it is intended to be used when a sale is made that is suitable to it. The form contains a blank in which it is intended that the machinery ordered shall be filled in, and there is a space also left blank in which to fill in the price of each article sold, and in the copy of the agreement in question kept by the plaintiffs what appear to be prices are filled in, but the copy of the agreement delivered to the defendants had not such prices filled in at the time of the delivery. They appear to have been filled in afterwards, however, but it does not appear by whom this was done. All the machinery was sold at a lump price of $3,500, and the prices filled in the agreement opposite the respective articles do not total $3,500 at all. There seems to have been a good deal of confusion in respect to this all round. The statement of claim alleges that the agreed price for the machinery was $3,902. The adding up on the face of the agreement of the prices filled in as mentioned is $3,702. The correct adding up is $3,492.12. No figuring whatever will represent the price of each one of the articles sold, taking the total amount of the sale at $3,500. Wilson, the agent of the plaintiffs who sold this machinery, utterly failed to explain how these figures came to be filled in there. I gather, however, that they were put in there for the purpose of in some way arriving at his commission. This is not a very satisfactory conclusion, I admit, but it is the best I can come to under the evidence. I have reached the conclusion, however, that these figures placed opposite each article sold were not in-

tended at all to represent the price at which each article was sold, and I have come to the conclusion therefore that the contract was not divisible, but that all the machinery mentioned in it was sold at a lump price of $3,500; and there was therefore "no separate and agreed price fixed above" to fill the language of the clause.

The machinery was taken out to the place of one of the defendants on 7th September—notoriously a time of the year when a threshing outfit is urgently required, and this machine was purchased as well for threshing the grain of the several defendants as for threshing the grain of other persons—and from 7th to 29th September, when the machinery was returned, the defendants were not in a position to use the machinery to advantage or profit. The plaintiffs were not, however, to blame for all this delay, but they or their agents were to blame for a good part of it. The evidence clearly establishes that it was the custom in cases of this sort for the company's agent to go out to the place where the machine was and set it up properly, start it and see that it worked satisfactorily. The 7th was Friday, and Wilson, the plaintiffs' agent, agreed to come out on the following Monday and start the machine, and he did not get out there until Monday the 17th September. Agents of the plaintiffs, experts and other persons, came out from time to time up to the 28th to endeavour to make the machinery work satisfactorily, and, having failed to do so, the defendants, on the 29th, returned it. The defendants attempted to work it on Monday the 10th September. They were not successful, however, because the pulleys were not in line, and they did not seem to understand how to put them in line. The machinery did not work properly all the time that the defendants had it in their possession. In the first place, the wrist pin heated continually, and this was a very serious drawback, because it involved continual stopping and waiting until it cooled down, and seriously affected the proper working of the machine. This trouble was experienced while they were taking it out from Wapella to the place where they attempted to work it; so much so that it took them a day and part of another to get about 9 miles. It continuously occurred while they were operating the machine, and it happened right down to their bringing it into Wapella on 28th September. The separator also did not work satisfactorily. It threw out grain very considerably in excess of what it should throw out. This defect

does not appear, however, to have impressed itself upon the defendants for some time, because they thought it was due to the fact that they were threshing hailed grain, but they discovered later on when threshing grain that had not been hailed that it was more defective than when it was threshing hailed grain. In so far, however, as the defect in respect to this separator was concerned, I am of opinion that the defendants are not in a position to escape liability by reason of that, because they did not give any notice specifying any defect in the separator, as required by the agreement, and the evidence does not disclose that the plaintiffs were aware of any defect in the separator until they received Stafford's telegram of 28th September requesting them to send a separator man at once for the machine; and, moreover, I am of opinion that, that being the first notice that was given, the plaintiffs were not afforded a reasonable time to remedy that defect, and I cannot find that they in any way waived their rights. It is quite clear that the defendants never gave notice in writing as specified by the special warranty with respect to any defect in the machinery; that is, no notice in writing was given specifying wherein the machinery failed to satisfy the warranty. But on 22nd September Kidd & Clements, the plaintiffs' agents through whom the sale was made, at the request of the defendants sent the following telegram to the plaintiffs at Regina: "Send expert Scott machine quick. Not satisfactory. Threatens to return machine." That telegram was received at Regina, and it is clear under the testimony of MacDonald, the manager of the company, that he was aware that a trouble with the machinery was that the wrist pin of the engine heated. After receipt of this telegram Wilson and Clements went out to endeavour to rectify the trouble with the wrist pin, but they did not succeed in doing so, and on the 27th and 28th Stafford, an expert engineer, went out for the same purpose, and he did not succeed in fixing it. These persons went out at the instance of the plaintiffs' manager. (Of course most of these facts that I have stated are controverted by the plaintiffs, but I am stating them as I find them). And on the 29th the defendants returned the machine. I am of opinion and hold that they were justified in so doing. It was contended that the heating of the wrist pin was due to the fact that the engineer was not a competent man. I find that he was competent to do work of this character, that he successfully

operated the Waterloo outfit which the defendants got in lieu of the one in question, and was able to work that without any trouble. It was urged that the notice as required by the agreement was not given to the plaintiffs or to Kidd & Clements. The notice I have referred to of 22nd September was sent by Kidd & Clements at the request of the defendants, and in that respect is within what I held in Abell Co. v. Long, 1 W. L. R. 24. That is, being so sent, it was sufficient notice to Kidd & Clements. As to not specifying the defect, the company were aware of what the defect was, and, being aware, they sent men to rectify it. I am of opinion that this was a waiver of the omission to set forth in the notice the character of the defect in so far as the wrist pin was concerned. It was a waiver because it was of a character to lead the defendants to suppose that the plaintiffs accepted the notice as a proper one, and were endeavouring to remedy the defect, and in this case it was the company themselves who instructed the act to be done which I hold constituted the waiver.

It was also urged that the defendants had not given the notice within the 10 days prescribed. There was a difference of opinion between the parties as to what constituted 10 days. The plaintiffs contend that the 10 days counted from the date that the defendants received the machinery and had it placed upon their property, and that every day counted from that time. The defendants, on the other hand, contend that they had 10 days to try it, that is, not 10 days from the date that they put it upon their property, but each day only that they actually worked it would count to make up the 10 days. I do not consider it necessary to decide that the defendants are right in that respect, but in order to determine what constitutes the 10 days, I think it necessary to refer to the facts again. I have stated that it was established that it was the custom of the plaintiffs to send a man out to set the machinery up properly and start it, and that Wilson, the man who was to do that work, did not go there for that purpose until the 17th. In the meanwhile the machine could not be properly operated. The pulleys were not properly lined up, as I have stated. Therefore, it seems to me clear that the defendants were not in a position to give that machinery a trial, within the meaning of the agreement and the custom that I have referred to, until their machine was properly set up so that it could be tested. That was not

done until the 17th, and therefore the 10 days only commenced to run from the 17th, and the notice given on the 22nd was before the 10 days had expired. It was set up at the trial that this machine was all right—there was nothing wrong with it. And in further support of that a trial was had with the machine after it was brought into Wapella, which I will refer to hereafter, and at that trial the evidence seems to be that the machinery worked quite satisfactorily. It was alleged that in the meanwhile practically nothing whatever had been done to it, and it was just in the same condition as it was when brought in by the defendants. The machinery lay at Wapella, where the defendants put it, for some 5 or 6 days before it was taken out to Carscadden's, where the trial was had, and during that time the plaintiffs' agent, Weir, and their experts, Atkinson, Stafford, and Doan, were about there, some all the time, some part of the time. It is an extraordinary thing, in view of the fact that this machinery had not worked properly at the defendants' places, that the wrist pin was continually heating, and that the separator worked so badly that Stafford, the plaintiffs' own man, stated he was "beat" and sent a telegram, which I have referred to, of the 28th September, "Send separator man at once, cannot make Scott's machine work," that when it was taken out to Carscadden's without practically a thing being done to it, it worked as satisfactorily as it did. All I can say is there is something about the matter that I utterly fail to understand.

It was contended on the part of the defendants that the taking of this machine by the plaintiffs out to Carscadden's operated as a rescission of the agreement. I am rather inclined to hold that opinion. These persons brought this machinery in, and they notified the plaintiffs that they had done so; the plaintiffs received the notice. They notified the plaintiffs on the 28th by telegram that they were returning the outfit; on the 29th they again notified them by telegram that they had returned it. The plaintiffs on the 28th wired a refusal to take the machinery back, and again on the 29th they wired them: "Outfit yours. Must comply with contract. We positively refuse to take back the outfit." They again notified them on the 29th by wire: "Our agents are instructed not to retake machinery. If machinery leaves your control you are responsible." In addition to that the defendants wrote them the letter of 28th September, notifying them

that the outfit did not fill the warranty, and they were compelled to return it to Wapella. Then, when Mr. Weir proposed to take it to Carscadden's, he asked the defendants to consent to it, and they absolutely refused to have anything to do with it all, stating that the outfit was theirs (the plaintiffs'), they could do what they pleased with it, and whatever they did was at their own risk. Notwithstanding all this, Weir, the plaintiffs' agent (and Mr. MacDonald said he was acting within his authority when he did it) did take this machine out to Carscadden's. He said he took it out without prejudice—well, he might as well go in a man's stable and take his horse and say he takes it without prejudice, and then contend that he is not guilty of trespass. However, inasmuch as I have sent the case off on the other ground, I will express no decided opinion upon this question; I merely mention it.

There will be judgment for the defendants with costs.

NORTH-WEST PROVINCES.

(WESTERN ASSINIBOIA.)

JOHNSTONE, J. AUGUST 26TH, 1907.

TRIAL.

BANNERMAN v. BARLOW.

Sale of Goods—Specific Article—Sale by Description—Reliance on Vendor's Representations—Proof of Falsity—Implied Warranty—Action for Price—Evidence—Contradicting Witness.

Action to recover the price of an engine and separator sold by plaintiff to defendant.

J. T. Brown, K.C., for plaintiff.

T. B. Teed, Alameda, for defendant.

JOHNSTONE, J.:—The plaintiff in his statement of claim alleged that on 15th December, 1905, it was agreed between him and the defendant that the plaintiff should deliver to

the defendant one John A. Bell engine and a Toronto Advance separator, etc., then owned by the plaintiff, and being at Poplar Point, Manitoba, by loading such machinery on a railway car of the Canadian Pacific Railway Company at Poplar Point, consigned to the defendant at Frobisher, Sask., and that the defendant would accept delivery and pay $1,250 in three equal annual instalments of $416.66 each, with interest, the first to fall due on 1st November, 1906; that at the time of the agreement certain terms thereof were reduced into writing and signed by the defendant; that in accordance with the agreement the plaintiff delivered the machinery.

The writing referred to (the usual form of lien note) containing, among other provisions, a reservation of title and ownership of the property in the plaintiff, and giving to the plaintiff the right of declaring all notes due at any time should he consider the indebtedness insecure, is set out in full. All these lien notes were declared due, and the plaintiff claims payment of $1,250 and interest.

The defence admitted the agreement and the signing of the notes in question, but set up by way of avoidance that the plaintiff at and before the sale represented the machinery in question to be then in good, complete running and working order, as good as new, and had only been used 120 days, and was fit for the purpose of threshing grain, for which purpose it was bought, as the plaintiff well knew; that such machinery was not as represented, but, on the contrary, had been in use for years, and was old and worn out and not fit for threshing grain; that the defendant, not having seen the machinery, had purchased it relying on the representations of the plaintiff. The defence also denied receipt and acceptance by the defendant.

The defendant, in giving evidence as to what took place when the agreement was entered into, stated that the plaintiff came to his farm on the afternoon of 15th December, 1905, a second occasion, and represented to the defendant, who had never seen the machinery, that the engine and separator and other attachments were in good shape, that it had only been used three seasons and had threshed only 120 days, and that he, the plaintiff, could fix it up as good as new, and that he, the defendant, relying on these representations, closed the deal, and a note for $1,250 was given

by the defendant in payment. This arrangement was afterwards, on the same day, at Frobisher, where the parties met by appointment at the plaintiff's request, varied, and the $1,250 note cancelled and the notes in question and a mortgage on the defendant's farm given in lieu thereof. The machinery to be shipped by the plaintiff in time for threshing.

The plaintiff, however, when called (and he was placed in the box by the defendant's counsel) denied ever having made any representations whatever, further stating that what and all he did say to the defendant was that he had bought the machinery from one Cunningham, who told him it was in good shape, and that he, the defendant, would have to take it as he the plaintiff had got it. This statement of the plaintiff I cannot believe. It seems to me incredible that the plaintiff, a dealer in implements for years, should have attempted on two different occasions to sell this second-hand machinery, and that during the negotiations not one word was said by him as to the condition of the articles, by way of description or otherwise.

It is highly improbable, moreover, that the defendant, an experienced thresher, should have entered into an arrangement to purchase a threshing outfit which he had never seen in the manner stated by the plaintiff, and without some assurance as to condition.

The importunity of the plaintiff in seeking to sell, and his desire for immediate settlement when he did sell, are circumstances to me very suspicious.

I find the representations alleged by the defendant to have been made to him by the plaintiff to induce the sale, were made as alleged, and that the defendant, relying on such representations, made the purchase of the machinery in question.

As to the condition of the machinery I find as a fact that the representations referred to as having been made to induce the sale, were not true in fact. A number of witnesses were called and gave evidence as to the condition of the machinery after its arrival at Frobisher. The defendant in describing it says: "On Monday 27th August I first saw it at Frobisher. The separator was nearly all in pieces then, was part rotten; carriers, one side wanting; belt looked

rotten, had been lying out. Separator did not look as if good to run much. As to engine, jacket on boiler burnt through, main support from axle cracked, the flues very much rusted, hose not fit for use."

Allen Collopy, a thresher of 8 years' experience, said of it: "Separator in a very poor condition, no carriers, no shoes, inside unfit to work, sieves unfit, inside working parts unsound. Expect old age would cover cause of condition. Deeks worn out and rotten, everything inside separator needed repairing."

These statements were corroborated by witness William Wood, thresher of 20 years' experience, and L. Thompson of 22 years' experience. The latter, after describing the defects at large, said: "The outfit was valueless for threshing and the separator only fit for old iron, save the trucks, which were worth $10." Quinn and Hodgins also gave evidence, and even the experts called by the plaintiff to refute the evidence of the defence admitted defects and that the outfit could not be made to work without repairs, which, one expert machinist estimated, would cost $50, and the other that it would take a machinist and a helper 20 hours to execute the necessary repairs.

The defendant before and after 27th August refused to accept the property, but no notice of rejection was given or sent to the plaintiff by the defendant, other than that contained in letters sent by the defendant to the plaintiff before the shipment; the last letter bearing date 19th August.

Having arrived at the conclusions stated, I hold that the defendant is entitled to succeed in the action. The sale was one by description, and the machinery sent did not correspond with the description, and there was a breach of the implied condition.

The Sale of Goods Ordinance, sec. 15, provides: "Where there is a contract for sale of goods by description, there is an implied condition that the goods shall correspond with the description." The defendant, being at liberty to refuse the machinery, did so.

In Whepp v. Varley, [1900] 1 Q. B. 573, a case very similar to the one before me, Channell, J., said: "This case turns on a fine point, namely, "Whether the words used

by the seller with regard to the machine were part of the description or merely amounted to a collateral warranty. . . . . The machine which was to be sold had never been seen by the buyer. It was described as being at Upton, as being a self binder, and being nearly new, and as having been used to cut about 50 or 60 acres. All these statements were made with regard to the machine, and we have to consider how many of these statements were identification of the machine and how much was collateral warranty. . . . . The term 'sale of goods by description' must apply to all cases where the purchaser has not seen the goods, but is relying on the description alone. It applies in a case like the present. . . . There is an implied condition that the goods shall correspond with the description, which is a different thing from warranty," etc. Bucknill, J.: "The machine was sold as a binder then at Upton, which was nearly new, and had only been used to cut 50 or 60 acres. Was that a collateral warranty or was it the description of the article intended to be sold? I am of opinion that it was the description, and that there was a contract for sale by description within the meaning of sec. 13 of the Sale of Goods Act."

The machine was put on the railway and got to the defendant's place of business. He could then accept or reject it. He wrote the letter of 2nd July, by which, though possibly he did not reject, he certainly did not accept, the machine.

In Whepp v. Varley a question arose as to whether or not the property in the machinery had or had not passed, but this question cannot arise in this case now before me,

The plaintiff having been called by the defendant as his witness, it was suggested at the trial that the defendant was bound by statements made by the plaintiff, and further that he, the defendant, was concluded from calling evidence of a contradictory character. The question was fully discussed in Mair v. Cully, 10 U. C. R. 321. In delivering judgment the Chief Justice said: "Upon the question that has been raised, we have no doubt; although the defendants made the plaintiff their witness by calling him (to prove that he had received from Kerr such letters as the papers produced in Kerr's writing purporting to be copies of), it did not necessarily follow that they were bound

by his answers, etc., or were debarred from attempting to establish by other proof the fact of usury, which the plaintiff had denied." See also remarks of Mr. Justice Burns on p. 324 et seq.

There will be judgment for the defendant with costs.

The notes and mortgages in the pleadings mentioned will be delivered up to be cancelled, and the registration of these mortgages in the land titles office vacated.

NORTH-WEST PROVINCES.

(EASTERN ASSINIBOIA.)

JOHNSTONE, J. AUGUST 27TH, 1907.

TRIAL.

KILBOURNE v. McEWAN.

Mechanics' Liens — Time for Registering Lien — Time of Completion of Work—Repairing Trifling Defects—Colourable Work to Save Lien.

Action to enforce a mechanic's lien.

J. A. M. Patrick, Yorkton, for plaintiff.

T. L. Metcalfe, Winnipeg and W. R. Parsons, Yorkton, for defendants.

JOHNSTONE, J.:—The defendant McEwan in February, 1906, contracted with his co-defendants for the erection and completion by him, on or before 1st July following, of an addition to the Balmoral hotel, owned by the Bronfmans, situate on lot 13, block 7, Yorkton, to cost $5,450. The plaintiff, a plasterer, agreed with McEwan to do the lathing and plastering according to specifications at 19 cents per square yard. This work was substantially completed by plaintiff on 10th July, when the defendants, although portions of the carpenter work were then incomplete and the painting unfinished, entered into possession.

During the progress of the work the plaintiff received on account of his sub-contract $199, leaving a balance due him of $197.72.

On 19th September, 1906, the plaintiff, at the request of one of the defendants the owners, did some patching and pointing, said by the plaintiff to be worth $7 or thereabouts.

On 19th October following the plaintiff filed a mechanics' lien against the lands, and in his statement (verified by affidavit) represented the work as having been performed, as follows:—

1906	July 10. To lathing 2055 sq. yards at 4c a sq. yard	$83.52
	Sept. 19. To plastering 2088 sq. yards at 15c sq. yard	313.20
	Total	$396.72

The specifications produced on the trial contains this provision: "The plasterers must do all necessary patching and pointing after the carpenter work is completed."

The carpenter's work was not completed on 10th July.

The plaintiff and his witness in giving evidence said the defendant Abe Bronfman in September came to a building in Yorkton on which they were then working, and requested the plaintiff to go to the hotel and do the patching and pointing and complete his contract according to specifications, and that in compliance with his request he, the plaintiff, went and did the work, which work was mostly done in the addition; and that this work occupied the plaintiff and his helper the best part of an afternoon; and that the combined work on the old building and on the addition was worth $7 or thereabouts.

The defendant Abe Bronfman positively denied the statement of the plaintiff and his helper, and asserted with the same positiveness that the plaintiff had been requested by him to do some pointing and plastering on the old building, for which he, this defendant, would pay, as he had already too much trouble with liens against the property; further, that the plaintiff had done no work on the addition; that all work done was on the old building; that there was no

plastering or patching required to be done on the annex, as this had been done before by other persons.

The statements of this witness as to where the work had been done were corroborated by his brother Samuel.

The plaintiff made no charge or demand for the work so done, but on its completion demanded payment of $197.72, balance due him in July, and threatened to file a lien in default of payment, which he afterwards did.

There was no proof that these repairs were such as had to be done under the contract so as to render the work of the plaintiff complete; there was no evidence forthcoming to distinguish defects occasioned by the workmen on the contract from injuries sustained to the plaster by guests or servants or sustained from other causes. The work done at most was of a trifling character, and I am convinced was not done in good faith and with the intention of completing the contract, but with the ulterior purpose of saving the lien, and this after the plaintiff had treated his contract as complete.

It was contended by the plaintiff's counsel, at the close of the case, that the lien had become revived by virtue of the work done on 19th September, and counsel in argument relied principally upon American cases referred to in Wallace on Mechanics' Liens. In these cases it has doubtless been held that under circumstances somewhat similar to those in this case, the lien was held to have been revived. I refer to Miller v. Wilkinson, 167 Mass. 136; D. L. Billing Co. v. Brand, 187 Mass. 417; and cases there referred to. I think these cases carry the principle of revival too far. They appear to me, as between contractors for labour and the material man, at least as far as our Ordinance is concerned, to render possible an advantage in favour of the former. Work of a trivial nature by the contractor may be performed on the premises the subject of the registered lien, without the knowledge or assent of the owner, and the lien attach, whereas the material man has no such privilege.

It has been held in Canada under Acts from which our Ordinance was taken, that where work had been done and accepted by the owner (as here) the existence of trifling defects, subsequently cured, did not extend the time till 30

days from the date such defects were made good, even though the work was accepted on the understanding that the defects were to be remedied; Makins v. Robinson, 6 O. R. 641; Kelley v. McKenzie, 1 Man. L. R. 169; Summers v. Beard, 24 O. R. 641, referring to Neill v. Carroll, 28 Gr. 339.

There will therefore be judgment in the action for the defendants Bronfman with costs.

YUKON TERRITORY.

CRAIG, J. JULY 31ST, 1907.

CHAMBERS.

HILDITCH v. YOTT.

Parties—Joinder of Defendants—Trespass to Mining Claim —Deceit—Misrepresentation — Contract—Right to Join Plaintiff without Consent — Construction of Rules.

Motion by defendant Perkins to strike out his name from the record as being improperly joined as a defendant.

Henry C. Bleecker, for defendant Perkins.

No one for the other defendants.

F. G. Crisp, for plaintiffs.

CRAIG, J.:—By the statement of claim the plaintiffs claim title to hillside off No. 9 Quartz Creek since 1st January, 1906. On 20th April, 1906, the defendant Perkins, then the owner of No. 8, agreed with the plaintiffs, or their predecessors in title, for the operation of No. 8, and by the same agreement a right to purchase was given until 1st September of that year for $4,000, and it was further by the same agreement provided that the gold taken out by the vendees or the operators was, in the event of purchase, to apply upon the purchase money. On 16th August Perkins, still being the owner of the same claim, agreed with the plaintiffs for the continuation of the former agreement to operate until 1st June, 1907, the same terms being in-

done until the 17th, and therefore the 10 days only commenced to run from the 17th, and the notice given on the 22nd was before the 10 days had expired. It was set up at the trial that this machine was all right—there was nothing wrong with it. And in further support of that a trial was had with the machine after it was brought into Wapella, which I will refer to hereafter, and at that trial the evidence seems to be that the machinery worked quite satisfactorily. It was alleged that in the meanwhile practically nothing whatever had been done to it, and it was just in the same condition as it was when brought in by the defendants. The machinery lay at Wapella, where the defendants put it, for some 5 or 6 days before it was taken out to Carscadden's, where the trial was had, and during that time the plaintiffs' agent, Weir, and their experts, Atkinson, Stafford, and Doan, were about there, some all the time, some part of the time. It is an extraordinary thing, in view of the fact that this machinery had not worked properly at the defendants' places, that the wrist pin was continually heating, and that the separator worked so badly that Stafford, the plaintiffs' own man, stated he was "beat" and sent a telegram, which I have referred to, of the 28th September, "Send separator man at once, cannot make Scott's machine work," that when it was taken out to Carscadden's without practically a thing being done to it, it worked as satisfactorily as it did. All I can say is there is something about the matter that I utterly fail to understand.

It was contended on the part of the defendants that the taking of this machine by the plaintiffs out to Carscadden's operated as a rescission of the agreement. I am rather inclined to hold that opinion. These persons brought this machinery in, and they notified the plaintiffs that they had done so; the plaintiffs received the notice. They notified the plaintiffs on the 28th by telegram that they were returning the outfit; on the 29th they again notified them by telegram that they had returned it. The plaintiffs on the 28th wired a refusal to take the machinery back, and again on the 29th they wired them: "Outfit yours. Must comply with contract. We positively refuse to take back the outfit." They again notified them on the 29th by wire: "Our agents are instructed not to retake machinery. If machinery leaves your control you are responsible." In addition to that the defendants wrote them the letter of 28th September, notifying them

that the outfit did not fill the warranty, and they were compelled to return it to Wapella. Then, when Mr. Weir proposed to take it to Carscadden's, he asked the defendants to consent to it, and they absolutely refused to have anything to do with it all, stating that the outfit was theirs (the plaintiffs'), they could do what they pleased with it, and whatever they did was at their own risk. Notwithstanding all this, Weir, the plaintiffs' agent (and Mr. MacDonald said he was acting within his authority when he did it) did take this machine out to Carscadden's. He said he took it out without prejudice—well, he might as well go in a man's stable and take his horse and say he takes it without prejudice, and then contend that he is not guilty of trespass. However, inasmuch as I have sent the case off on the other ground, I will express no decided opinion upon this question; I merely mention it.

There will be judgment for the defendants with costs.

NORTH-WEST PROVINCES.

(WESTERN ASSINIBOIA.)

JOHNSTONE, J. AUGUST 26TH, 1907.

TRIAL.

BANNERMAN v. BARLOW.

Sale of Goods—Specific Article—Sale by Description—Reliance on Vendor's Representations—Proof of Falsity—Implied Warranty—Action for Price—Evidence—Contradicting Witness.

Action to recover the price of an engine and separator sold by plaintiff to defendant.

J. T. Brown, K.C., for plaintiff.

T. B. Teed, Alameda, for defendant.

JOHNSTONE, J.:—The plaintiff in his statement of claim alleged that on 15th December, 1905, it was agreed between him and the defendant that the plaintiff should deliver to

the defendant one John A. Bell engine and a Toronto Advance separator, etc., then owned by the plaintiff, and being at Poplar Point, Manitoba, by loading such machinery on a railway car of the Canadian Pacific Railway Company at Poplar Point, consigned to the defendant at Frobisher, Sask., and that the defendant would accept delivery and pay $1,250 in three equal annual instalments of $416.66 each, with interest, the first to fall due on 1st November, 1906; that at the time of the agreement certain terms thereof were reduced into writing and signed by the defendant; that in accordance with the agreement the plaintiff delivered the machinery.

The writing referred to (the usual form of lien note) containing, among other provisions, a reservation of title and ownership of the property in the plaintiff, and giving to the plaintiff the right of declaring all notes due at any time should he consider the indebtedness insecure, is set out in full. All these lien notes were declared due, and the plaintiff claims payment of $1,250 and interest.

The defence admitted the agreement and the signing of the notes in question, but set up by way of avoidance that the plaintiff at and before the sale represented the machinery in question to be then in good, complete running and working order, as good as new, and had only been used 120 days, and was fit for the purpose of threshing grain, for which purpose it was bought, as the plaintiff well knew; that such machinery was not as represented, but, on the contrary, had been in use for years, and was old and worn out and not fit for threshing grain; that the defendant, not having seen the machinery, had purchased it relying on the representations of the plaintiff. The defence also denied receipt and acceptance by the defendant.

The defendant, in giving evidence as to what took place when the agreement was entered into, stated that the plaintiff came to his farm on the afternoon of 15th December, 1905, a second occasion, and represented to the defendant, who had never seen the machinery, that the engine and separator and other attachments were in good shape, that it had only been used three seasons and had threshed only 120 days, and that he, the plaintiff, could fix it up as good as new, and that he, the defendant, relying on these representations, closed the deal, and a note for $1,250 was given

by the defendant in payment. This arrangement was afterwards, on the same day, at Frobisher, where the parties met by appointment at the plaintiff's request, varied, and the $1,250 note cancelled and the notes in question and a mortgage on the defendant's farm given in lieu thereof. The machinery to be shipped by the plaintiff in time for threshing.

The plaintiff, however, when called (and he was placed in the box by the defendant's counsel) denied ever having made any representations whatever, further stating that what and all he did say to the defendant was that he had bought the machinery from one Cunningham, who told him it was in good shape, and that he, the defendant, would have to take it as he the plaintiff had got it. This statement of the plaintiff I cannot believe. It seems to me incredible that the plaintiff, a dealer in implements for years, should have attempted on two different occasions to sell this second-hand machinery, and that during the negotiations not one word was said by him as to the condition of the articles, by way of description or otherwise.

It is highly improbable, moreover, that the defendant, an experienced thresher, should have entered into an arrangement to purchase a threshing outfit which he had never seen in the manner stated by the plaintiff, and without some assurance as to condition.

The importunity of the plaintiff in seeking to sell, and his desire for immediate settlement when he did sell, are circumstances to me very suspicious.

I find the representations alleged by the defendant to have been made to him by the plaintiff to induce the sale, were made as alleged, and that the defendant, relying on such representations, made the purchase of the machinery in question.

As to the condition of the machinery I find as a fact that the representations referred to as having been made to induce the sale, were not true in fact. A number of witnesses were called and gave evidence as to the condition of the machinery after its arrival at Frobisher. The defendant in describing it says: "On Monday 27th August I first saw it at Frobisher. The separator was nearly all in pieces then, was part rotten; carriers, one side wanting; belt looked

rotten, had been lying out. Separator did not look as if good to run much. As to engine, jacket on boiler burnt through, main support from axle cracked, the flues very much rusted, hose not fit for use."

Allen Collopy, a thresher of 8 years' experience, said of it: "Separator in a very poor condition, no carriers, no shoes, inside unfit to work, sieves unfit, inside working parts unsound. Expect old age would cover cause of condition. Deeks worn out and rotten, everything inside separator needed repairing."

These statements were corroborated by witness William Wood, thresher of 20 years' experience, and L. Thompson of 22 years' experience. The latter, after describing the defects at large, said: "The outfit was valueless for threshing and the separator only fit for old iron, save the trucks, which were worth $10." Quinn and Hodgins also gave evidence, and even the experts called by the plaintiff to refute the evidence of the defence admitted defects and that the outfit could not be made to work without repairs, which, one expert machinist estimated, would cost $50, and the other that it would take a machinist and a helper 20 hours to execute the necessary repairs.

The defendant before and after 27th August refused to accept the property, but no notice of rejection was given or sent to the plaintiff by the defendant, other than that contained in letters sent by the defendant to the plaintiff before the shipment; the last letter bearing date 19th August.

Having arrived at the conclusions stated, I hold that the defendant is entitled to succeed in the action. The sale was one by description, and the machinery sent did not correspond with the description, and there was a breach of the implied condition.

The Sale of Goods Ordinance, sec. 15, provides: "Where there is a contract for sale of goods by description, there is an implied condition that the goods shall correspond with the description." The defendant, being at liberty to refuse the machinery, did so.

In Whepp v. Varley, [1900] 1 Q. B. 573, a case very similar to the one before me, Channell, J., said: "This case turns on a fine point, namely, "Whether the words used

by the seller with regard to the machine were part of the description or merely amounted to a collateral warranty. . . . . The machine which was to be sold had never been seen by the buyer. It was described as being at Upton, as being a self binder, and being nearly new, and as having been used to cut about 50 or 60 acres. All these statements were made with regard to the machine, and we have to consider how many of these statements were identification of the machine and how much was collateral warranty. . . . . The term 'sale of goods by description' must apply to all cases where the purchaser has not seen the goods, but is relying on the description alone. It applies in a case like the present. . . . There is an implied condition that the goods shall correspond with the description, which is a different thing from warranty," etc. Bucknill, J.: "The machine was sold as a binder then at Upton, which was nearly new, and had only been used to cut 50 or 60 acres. Was that a collateral warranty or was it the description of the article intended to be sold? I am of opinion that it was the description, and that there was a contract for sale by description within the meaning of sec. 13 of the Sale of Goods Act."

The machine was put on the railway and got to the defendant's place of business. He could then accept or reject it. He wrote the letter of 2nd July, by which, though possibly he did not reject, he certainly did not accept, the machine.

In Whepp v. Varley a question arose as to whether or not the property in the machinery had or had not passed, but this question cannot arise in this case now before me,

The plaintiff having been called by the defendant as his witness, it was suggested at the trial that the defendant was bound by statements made by the plaintiff, and further that he, the defendant, was concluded from calling evidence of a contradictory character. The question was fully discussed in Mair v. Cully, 10 U. C. R. 321. In delivering judgment the Chief Justice said: "Upon the question that has been raised, we have no doubt; although the defendants made the plaintiff their witness by calling him (to prove that he had received from Kerr such letters as the papers produced in Kerr's writing purporting to be copies of), it did not necessarily follow that they were bound

by his answers, etc., or were debarred from attempting to establish by other proof the fact of usury, which the plaintiff had denied." See also remarks of Mr. Justice Burns on p. 324 et seq.

There will be judgment for the defendant with costs.

The notes and mortgages in the pleadings mentioned will be delivered up to be cancelled, and the registration of these mortgages in the land titles office vacated.

NORTH-WEST PROVINCES.

(EASTERN ASSINIBOIA.)

JOHNSTONE, J. AUGUST 27TH, 1907.

TRIAL.

KILBOURNE v. McEWAN.

Mechanics' Liens — Time for Registering Lien — Time of Completion of Work—Repairing Trifling Defects—Colourable Work to Save Lien.

Action to enforce a mechanic's lien.

J. A. M. Patrick, Yorkton, for plaintiff.

T. L. Metcalfe, Winnipeg and W. R. Parsons, Yorkton, for defendants.

JOHNSTONE, J.:—The defendant McEwan in February, 1906, contracted with his co-defendants for the erection and completion by him, on or before 1st July following, of an addition to the Balmoral hotel, owned by the Bronfmans, situate on lot 13, block 7, Yorkton, to cost $5,450. The plaintiff, a plasterer, agreed with McEwan to do the lathing and plastering according to specifications at 19 cents per square yard. This work was substantially completed by plaintiff on 10th July, when the defendants, although portions of the carpenter work were then incomplete and the painting unfinished, entered into possession.

During the progress of the work the plaintiff received on account of his sub-contract $199, leaving a balance due him of $197.72.

On 19th September, 1906, the plaintiff, at the request of one of the defendants the owners, did some patching and pointing, said by the plaintiff to be worth $7 or thereabouts.

On 19th October following the plaintiff filed a mechanics' lien against the lands, and in his statement (verified by affidavit) represented the work as having been performed, as follows:—

1906	July 10. To lathing 2055 sq. yards at 4c a sq. yard	$83.52
	Sept. 19. To plastering 2088 sq. yards at 15c sq. yard	313.20
	Total	$396.72

The specifications produced on the trial contains this provision: "The plasterers must do all necessary patching and pointing after the carpenter work is completed."

The carpenter's work was not completed on 10th July.

The plaintiff and his witness in giving evidence said the defendant Abe Bronfman in September came to a building in Yorkton on which they were then working, and requested the plaintiff to go to the hotel and do the patching and pointing and complete his contract according to specifications, and that in compliance with his request he, the plaintiff, went and did the work, which work was mostly done in the addition; and that this work occupied the plaintiff and his helper the best part of an afternoon; and that the combined work on the old building and on the addition was worth $7 or thereabouts.

The defendant Abe Bronfman positively denied the statement of the plaintiff and his helper, and asserted with the same positiveness that the plaintiff had been requested by him to do some pointing and plastering on the old building, for which he, this defendant, would pay, as he had already too much trouble with liens against the property; further, that the plaintiff had done no work on the addition; that all work done was on the old building; that there was no

plastering or patching required to be done on the annex, as this had been done before by other persons.

The statements of this witness as to where the work had been done were corroborated by his brother Samuel.

The plaintiff made no charge or demand for the work so done, but on its completion demanded payment of $197.72, balance due him in July, and threatened to file a lien in default of payment, which he afterwards did.

There was no proof that these repairs were such as had to be done under the contract so as to render the work of the plaintiff complete; there was no evidence forthcoming to distinguish defects occasioned by the workmen on the contract from injuries sustained to the plaster by guests or servants or sustained from other causes. The work done at most was of a trifling character, and I am convinced was not done in good faith and with the intention of completing the contract, but with the ulterior purpose of saving the lien, and this after the plaintiff had treated his contract as complete.

It was contended by the plaintiff's counsel, at the close of the case, that the lien had become revived by virtue of the work done on 19th September, and counsel in argument relied principally upon American cases referred to in Wallace on Mechanics' Liens. In these cases it has doubtless been held that under circumstances somewhat similar to those in this case, the lien was held to have been revived. I refer to Miller v. Wilkinson, 167 Mass. 136; D. L. Billing Co. v. Brand, 187 Mass. 417; and cases there referred to. I think these cases carry the principle of revival too far. They appear to me, as between contractors for labour and the material man, at least as far as our Ordinance is concerned, to render possible an advantage in favour of the former. Work of a trivial nature by the contractor may be performed on the premises the subject of the registered lien, without the knowledge or assent of the owner, and the lien attach, whereas the material man has no such privilege.

It has been held in Canada under Acts from which our Ordinance was taken, that where work had been done and accepted by the owner (as here) the existence of trifling defects, subsequently cured, did not extend the time till 30

days from the date such defects were made good, even though the work was accepted on the understanding that the defects were to be remedied; Makins v. Robinson, 6 O. R. 641; Kelley v. McKenzie, 1 Man. L. R. 169; Summers v. Beard, 24 O. R. 641, referring to Neill v. Carroll, 28 Gr. 339.

There will therefore be judgment in the action for the defendants Bronfman with costs.

YUKON TERRITORY.

CRAIG, J. JULY 31ST, 1907.

CHAMBERS.

HILDITCH v. YOTT.

Parties—Joinder of Defendants—Trespass to Mining Claim —Deceit—Misrepresentation — Contract—Right to Join Plaintiff without Consent — Construction of Rules.

Motion by defendant Perkins to strike out his name from the record as being improperly joined as a defendant.

Henry C. Bleecker, for defendant Perkins.

No one for the other defendants.

F. G. Crisp, for plaintiffs.

CRAIG, J.:—By the statement of claim the plaintiffs claim title to hillside off No. 9 Quartz Creek since 1st January, 1906. On 20th April, 1906, the defendant Perkins, then the owner of No. 8, agreed with the plaintiffs, or their predecessors in title, for the operation of No. 8, and by the same agreement a right to purchase was given until 1st September of that year for $4,000, and it was further by the same agreement provided that the gold taken out by the vendees or the operators was, in the event of purchase, to apply upon the purchase money. On 16th August Perkins, still being the owner of the same claim, agreed with the plaintiffs for the continuation of the former agreement to operate until 1st June, 1907, the same terms being in-

cluded in the agreement as to the application of the gold taken out upon the purchase price. Under these two agreements the plaintiffs operated. On 28th January, 1907, the plaintiffs bought under the agreements and took a bill of sale of the claim in question, which they recorded on 4th February, 1907. It is alleged that between 1st January, 1906, and 1st January, 1907, the defendants Meyers, Yott, Botsford, Mendelina, and Rouse trespassed upon claim No. 8, and took away, washed up, and appropriated to their own use a quantity of gold-bearing gravel and pay dirt. It is alleged in the pleadings that, at the time of making the agreements and the bill of sale pursuant to the agreements, the defendant Perkins represented that the part trespassed upon was unworked and virgin ground, and that by reason of such representation the plaintiffs purchased.

The defendant Perkins now moves to strike out his name from the record as being improperly joined as a party defendant, the plaintiffs, under the Rule, having no right to join him, as they are suing him for a separate cause of action.

On the argument Mr. Bleecker mainly argued that the action against Perkins was one for deceit. In my opinion, the pleadings do not sufficiently set out the cause of action for deceit, and, unless the pleadings were amended in the statement and the allegations, the plaintiffs could not succeed in an action for deceit. The pleadings, to my mind, involve only a representation by way of contract or promise or guarantee, and are not properly framed to entitle the plaintiffs to recover in an action for deceit and misrepresentation.

The date given for the trespass covers the entire year, being the year in which the various transactions took place, that is, the agreements for operation and sale, followed by the bill of sale. Whether the trespass was committed before 20th April or after does not appear by the pleadings. No particulars have been demanded, and the defendants have not yet answered.

It is contended that, under the authority of Smurthwaite v. Hannay, [1904] A. C. 494; Sadler v. Great Western R. W. Co., [1898] 2 Q. B. 688; Gower v. Couldridge, [1898] 1 Q. B. 348; Mooney v. Joyce, 17 P. R. 241; Faulds v. Faulds, 17 P. R. 480; Re Jones v. Bissonnette, 3 O. L. R. 54, 1 O. W.

R. 13; Quigley v. Waterloo Manufacturing Co., 1 O. L. R. 606; and Evans v. Jaffray, 1 O. L. R. 614—where it clearly appears that separate causes of action are included in the one writ and statement of claim, they cannot be so brought. In the English Rule the words are as follows: "Arising out of the same transaction or series of transactions." No such words appear in our Rule. In the Ontario Rule the same words occur, the words in the Ontario Rule being—"In respect of or arising out of the same transaction or occurrence or series of transactions or occurrences." In all the Rules the words in regard to the relief sought are "whether jointly, severally, or in the alternative." It is hard to reconcile the judgments which, to my mind, are conflicting in some cases, but the distinction seems to be made pretty clearly by all the authorities that where the causes of action are clear and separate, they cannot be joined in the one suit, that the Rule applies simply to joinder of parties, not to the joinder of causes of action. That seems to be qualified to a very considerable extent in Langley v. Law Society of Upper Canada, 3 O. L. R. 245, 1 O. W. R. 143, and Hately v. Merchants Despatch Co., 2 O. R. 385.

In the case before me it would certainly be most convenient that this action should be tried with all the parties before the Court in the one suit. The trespass is one either against Perkins or against the plaintiffs, depending entirely upon the time when the trespass took place. No evidence is produced before me to shew whether the bill of sale contains an assignment of the cause of action—but I assume it does not from statements made by counsel—nor whether the bill of sale includes a covenant broad enough to guarantee title to the soil as virgin soil—because the sale is one of mining ground and means the conveyance of placer ground. I am not aware on what ground the plaintiffs hope to succeed in their action against the defendant Perkins upon his representation, but I must assume for the purpose of this motion that they have a cause of action against him on his representation or guarantee on which they hope to recover. This would seem to me to be clearly a case of a right to recover in the alternative. It is true that the one action is against the five first-named defendants for trespass and against the remaining defendant Perkins for guarantee or representation relating to the very ground trespassed upon. But I think the one is so much involved in the other and the right to recover

against one party or the other is so much dependent on the way in which the evidence comes out, that it is proper that all the issues should be tried in the one action in some way or other, either by making Perkins a party plaintiff or by leaving him a party defendant. In this case Perkins might have joined as a plaintiff with the present plaintiffs for the same trespass, and it would be wholly unnecessary that there should be two actions to try out this matter. If the plaintiffs intend to give evidence upon an action for deceit, I certainly would not allow such a cause of action to be joined with the other issues in this action, and so far as the statement of claim which they have set up involves any such action it will be disallowed, and they cannot recover for deceit in the same action.

It has been suggested that if Perkins is not to remain as a party defendant he be added as a party plaintiff. The plaintiffs allege that they offered indemnity, and the defendant Perkins alleges that he was quite willing to assign his interest upon receiving a certain sum. How this may be I cannot now decide upon the evidence before me. As to my right to add Perkins as a party plaintiff I have some little doubt, but not very much. The English Rule provides that a person cannot be made a party plaintiff without his consent. Our Rule has not those words, and I think the words were deliberately left out of the Rule. So that I think a person may be made a party plaintiff by the Court. I think Perkins should be a party plaintiff suing with the present plaintiffs for trespass, and the order will be that he be added as a party plaintiff, upon the present plaintiffs sufficiently indemnifying him, or in the alternative Perkins may assign his right of recovery for the trespass to the present plaintiffs, who may amend their pleadings accordingly. If that cannot be done within 10 days from this order, then he will remain a party defendant in the action, but not so that any action for deceit can be brought against him, the object being that if the plaintiffs establish their right to recover upon the warranty or representation which they set up, they may recover if they have no action against the present defendants for the trespass committed during the time when their title ran.

The costs will be costs in the cause to the successful party.

YUKON TERRITORY.

AUGUST 1ST, 1907.

FULL COURT.

CHUTE v. STEWART.

Malicious Prosecution—Reasonable and Probable Cause — Malice—Functions of Judge and Jury—Inference from Undisputed Facts—Questions Put to Jury—Findings of Jury—Perversity—Court en Banc Disregarding Findings and Reversing Judgment at Trial.

Appeal by defendant from judgment of MACAULAY, J., upon the findings of a jury, in favour of plaintiff in an action for malicious prosecution.

The appeal was heard by DUGAS, CRAIG, and MACAULAY, JJ.

F. J. Stacpoole and R. L. Ashbaugh, for defendant.

F. J. McDougal, for plaintiff.

DUGAS, J.:—Having sued for malicious prosecution, the plaintiff was bound to prove: first, his innocence; secondly, that there was a want of reasonable and probable cause for the prosecution; and, lastly, that the proceedings against him were initiated in a malicious spirit; that is, from an indirect and improper motive and not in furtherance of justice. This is what is clearly laid down by Lord Justice Bowen in Abrath v. North Eastern R. W. Co., 11 App. Cas. 247, and accepted by the House of Lords as establishing the law on the subject.

The affidavit which the plaintiff made, and upon which he was accused by the defendant of perjury, was one which is known here as an affidavit of representation under the mining regulations then in existence. He was bound to establish by affidavit before the Gold Commissioner that a certain amount of work had been done upon the 3 claims according to an established scale. He swore that "he had done or caused to be done" work on the Niobe 4524, grouping

certificate number 119, Mineral Claim, in the Bonanza Mining Division of the Dawson District, situate on the ridge between Eldorado and Bonanza. To represent Niobe, Tennessee 4498, and Zulu Chief 4525, to the value of at least $300, since the 16th day of August, 1904. The following is a detailed statement of such work: made open cut 63 feet long, 10 x 5; ¾ of this work through solid formation; and open cut 36 feet long, 6 x 5 through broken rock." It is for having sworn so that he was indicted.

A verdict of "not guilty" having been entered in his favour, no doubt that this establishes a presumption of innocence prima facie in his favour. However, it did not take away from the defendant in this cause the right to establish that in fact the affidavit was false, and no doubt the defendant has made that proof.

In his evidence at the trial the plaintiff himself admitted that his affidavit was partly untrue, inasmuch as it gives to understand that all the work sworn to was representation work for the current year, whereas in fact a great portion thereof had been made in previous years. The plaintiff was interested, in order to obtain a renewal grant for his claims, to have such a proof made before the Gold Commissioner as would convince that official that work amounting in value to $300 had really been made during that year on the claim in question, grouped with the two others mentioned in the affidavit. By his own evidence, pp. 33-34, he shews that a cut of 30 feet long existed previously, and that the 63 feet which he mentions in his affidavit included the 30 feet in question. His principal witness, Lacoste, pp. 44-45, puts the same cut at 40 to 45 feet long, and, upon the question as to whether it was not 50 feet long, his answer is, "No, I don't think so, I did not measure it." But he, in so many words, is also forced to admit that the open cut of 63 feet long, which he also mentioned in his affidavit, included the old one.

There is nothing in the plaintiff's affidavit which tends to inform the Gold Commissioner of these facts, and upon reading it it is necessarily inferred that an open cut of 63 feet long by 10 by 5 feet, three-quarters of which was through solid formation, had been made that year, and that an open cut of 36 feet long by 6 by 5 feet had been made through broken rock. No doubt, therefore, that this affidavit did

not represent the true facts, and that it was false on this point.

There is more than that: it was also false, inasmuch as he wilfully swore that he knew a thing to be true which at the same time he did not know; verbo "Perjury," Burn's Justice, p. 667, vol. 3. For the fact is that, being sick and detained at a hospital in Dawson, he charged Lacoste to make those $300 of representation work at a cost of $100. It took Lacoste and his fellow worker 14 days to perform the same. They returned to Dawson, and having given affidavits that such work had been done, the plaintiff himself gives the affidavit in question without having seen the work and without knowing whether it had really been done. In fact he never saw it before a year after. In that respect also this affidavit of his is false. True it is that, when he was criminally prosecuted for having done so, a verdict of "not guilty" was entered in his favour. The circumstances under which he gave the same may have saved him, but the fact remains, notwithstanding, that his affidavit was false in two different ways. Any one knowing the facts to be untrue would, therefore, have been justified in prosecuting, and the defendant more particularly was, as an interested party in these three claims, desiring the representation work properly done and regularly established in the Gold Commissioner's office. He seems to have been very anxious about the same, and to have been in fear of losing them on account of the misrepresentations of the plaintiff and his witnesses. He had them staked anew so as to be sure that they were secured to him.

Upon the whole, this evidence as to the untruthfulness of the affidavit coming from the plaintiff, and being also inferred from the testimony of his own witness Lacoste, left no dispute on that point to be determined by the jury, and it seems to me that the trial Judge should have found in this, at least, that there was no want of reasonable and probable cause in having had the plaintiff arrested. For that reason I am in favour of purely and simply setting aside the verdict of the jury and dismissing the case, and having judgment entered accordingly in favour of the defendant, and this appeal maintained with costs.

Here I wish to say that it is our duty to draw the attention of whomsoever it may concern to the loose way in which,

too often, affidavits are prepared, sworn to, and received in this Territory. The present case is an example of it. The solemnity of an oath should never be forgotten. The public is largely interested in that, as it may very often lead to a great denial of justice. Men occupying public positions, more particularly, should be very careful to see that nothing in their offices be done which could in anyway lessen the importance which should be attached to sworn documents, to be made use of, under the laws which they are charged to administer.

I had some doubt as to the right of this Court to interfere with the functions of the trial Judge as to reasonable and probable cause. Our Rule 515 declares: "The Court en banc shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case requires." The English Rule 568 adds—"draw all inferences of fact not inconsistent with the finding of the jury;" and Holmested & Langton, under Rule 615, cite different cases, to which I refer, shewing that, even under this strong language of the English Rule, it has been held that when the Court is satisfied that the verdict is against the weight of evidence, and considers that all the facts are before it, it may enter judgment accordingly instead of ordering a new trial. It will be noted that our Rule is broader than the English Rule, which limits inferences to facts not inconsistent with the finding of the jury.

It is a settled point that the Judge has to determine whether there is or is not want of reasonable and probable cause in a malicious prosecution. This he infers from the facts. Taking the wording of our Rule, as well as what has been held in England and in Ontario, it seems to me now that there cannot be any doubt that this Court, sitting en banc, has the right to do what the trial Judge should have done; that this Court is not restrained by the views of the trial Judge on the question; and that, being of the opinion that the plaintiff has not proven, for the reasons above mentioned, that there was want of reasonable and probable cause, it is our duty to declare that there was no case for the jury and that judgment should have been entered in favour of the defendant.

On the question of malice, I might say that the trial Judge was, according to the views I entertain, obliged to instruct the jury in such a way as to leave no doubt that they understood well what it meant. I believe he did not sufficiently do so.

It is laid down in all cases of malicious prosecution wherein such a question arises, that it must be malice in fact, which is distinguishable from malice in law; the latter being inferred generally where the defendant is in the wrong, whilst malice in fact is based upon an indirect and improper motive.

It is true that at the beginning of his charge (p. 51) the trial Judge says: "The great question for you to consider is whether Stewart, the defendant, when he entered that prosecution against the plaintiff, was actuated by dishonest motives, or whether or not he had a reasonable and bona fide belief in the course that he was taking. And, at p. 54, he somewhat refers to the same point in the following words: "If a reasonable man under the circumstances could come to the conclusion—reasonably come to the conclusion—that they were guilty of perjury, then, although he may have been actuated by feelings of ill-will against those people, still he would not be guilty—you could not find against him in this action, because he would still have a right to prosecute them; but if he had no grounds—if you were of the opinion that he had no reasonable grounds for supposing that they had done what was wrong, then the case would be quite different—malice would be presumed—and on that I need not deal with you. I mention the question of malice to you because it would be rather conflicting. There is what is known as 'actual malice' or 'spite,' and 'malice in law.' Malice in law is something which would be inferred in the case where a man without any motive or ill-will—without any reasonable grounds—would lay an information against a man for the commission of a crime without any reasonable grounds for doing so. In law he would be presumed to have done so maliciously. You must consider whether or not he had reasonable grounds."

It seems to me that this was not sufficient, and that the jury should have been instructed as to the different principles which govern both cases, and where malice in law should be distinguished from malice in fact; and that they should have

been told that their duty was to find whether or not the defendant had been actuated by an indirect and improper motive and not in furtherance of justice.

It is true that their answer to the second question, more particularly, would seem to find that the defendant did act under the impulse of actual malice. Yet, we do not know what was really in the mind of the jury; and as, by the evidence, there is no doubt that the plaintiff was at fault, and that therefore malice cannot be inferred against the defendant, it seems that by accepting the verdict of the jury on this particular point, there would be a danger that an injustice might be done to the defendant.

If, therefore, I was not already of the opinion that the action should be dismissed, for the reasons above mentioned, I would say that at least a new trial should be ordered.

Authorities considered: Lister v. Perryman, L. R. 4 H. L. 521; Hicks v. Faulkner, 8 Q. B. D. 167; Abrath v. North Eastern R. W. Co., 11 Q. B. D. 440; Delegal v. Highley, 3 Bing. N. C. 950; Byne v. Moore, 5 Taunt. 187; Mitchell v. Jenkins, 5 B. & Ad. 594; Brown v. Hawkes, [1891] 2 Q. B. 718; Willans v. Taylor, 6 Bing. 183; Incledon v. Barry, 1 Camp. 203 n.; Turner v. Ambler, 10 Q. B. 252; Hailes v. Marks, 7 H. & N. 56; Allen v. Flood, [1898] A. C. 1; Edwards v. Midland R. W. Co., 6 Q. B. D. 287; Roscoe on Evidence, 16th ed., p. 882; Archibald v. McLaren, 21 S. C. R. 588; Hamilton v. Cousineau, 19 O. R. 219; Pring v. Wyatt, 5 O. L. R. 505, 2 O. W. R. 22, 321; Wilson v. Tennant, 25 O. R. 344; Baker v. Kilpatrick, 7 B. C. R. 150; Tanghe v. Morgan, 3 W. L. R 146; Holmested & Langton, Rule 615, p. 812, authorities cited under this Rule.

CRAIG, J.:—The parties to the suit are miners, and in the case in question it appears that they owned joint interests in certain quartz mining claims which by the regulations in force in this country have to be renewed yearly, either by the payment of $100 per claim or the performance of $100 worth of work. In the case in question there were three claims. Chute arranged for the doing of the work with two persons—Tidd and Lacoste—and contracted with them for the performance of the work for the sum of $100 for the whole three claims, being really one-third less than the amount of work required to be done, as represented in cash, in payment of wages. Tidd and Lacoste did this work, and

filed an affidavit in which they swore that a certain cut had been dug, giving the dimensions, and that three-quarters of this cut was through solid rock. Chute, the plaintiff, at the time of the work being done was not present; he never saw the work until after an action was brought. Tidd and Lacoste made their affidavits, to the effect I have stated, before the mining renewal clerk, and this clerk brought over a form for the owner Chute to swear to, Chute at the time lying ill in the hospital, and Chute swore that he had done or caused to be done work as mentioned to the value of $300. Stewart, seeing the work done and fearing that enough had not been done to preserve their title to the property, had the claims re-staked or jumped, as it is called, and an action was brought by the re-stakers to set aside the grant which had been given to Chute and his co-owners. Stewart offered to let his co-owners back on the property again, upon the payment by them of $100 each, which, he asserted, would reimburse him for expenses. They both refused, relying upon the title which they had acquired by the previous work and affidavits. There is no doubt whatever that the affidavit was false in fact; that Tidd and Lacoste had not done the work which they swore they had done; and that Chute in swearing that they had done the work swore to what was actually false in fact. Whether he was guilty of perjury or not is another matter. After the trial of the protest in the Gold Commissioner's office to test the title of the jumpers and Chute and his co-owners, which suit resulted in favour of Chute, because the Gold Commissioner held that no one but the Crown could attack the grants even if obtained wrongfully as they were obtained, Stewar went about complaining of the result of this suit, and said to one witness that he would get even, or words to that effect. Stewart then instituted the prosecution for perjury. The plaintiff was sent up for trial, but the Crown upon the case coming on for trial entered a nolle pros. Then Chute brings this action for malicious prosecution and arrest. The evidence was all put in on behalf of the plaintiff, and the defendant called no witnesses. At the close of the plaintiff's case, counsel asked that the action be dismissed and that the trial Judge find that there was reasonable and probable cause to lay the information. Mr. Ashbaugh, counsel for the defendant, submitted at the close of the plaintiff's case that, there being no disputed facts, there was nothing for the jury to find, and

that it was the duty of the Judge thereupon to find the question of reasonable and probable cause. The Judge, however, submitted the case to the jury and charged them and submitted two questions and two only as follows:—

1st. Did the defendant take reasonable care to inform himself of the true state of the case?

2nd. Did he honestly believe the case which he laid before the magistrate?

To both these questions the jury answered in the negative, and thereupon the Judge said: "Then, gentlemen of the jury, that being so, the plaintiff will be entitled to a verdict, and you will state what damages you assess." The damages were assessed at $770; and the Judge then said: "On the answers of the jury to the questions submitted there will be a verdict or judgment for the plaintiff for $770 and costs."

It is now conteded that, there being no disputed facts, there was nothing to submit to the jury, and that the question of reasonable and probable cause is clearly one of law to be determined by the trial Judge. It was further argued that the jury must find, not only upon the questions submitted, but further upon the question of malice, and without that finding of actual malice no verdict could have been rendered for the plaintiff; that it was an error on the part of the Judge to tell the jury that they must consider reasonable and probable cause, and that the trial Judge was further in error when he directed the jury not to find malice, and further that the jury were manifestly perverse in their finding upon the evidence. In answer it is contended, on the authority of the cases which I will afterwards consider, that the two questions submitted sufficiently covered the ground, and that an inference from these two questions would be an inference of malice; that the jury were not perverse; and that there were disputed questions of fact.

In considering this matter I must admit that the authorities are in a somewhat conflicting and hazy condition. As to the question of whether there were contested questions of fact, I do not think there were any; I think that all the material facts which would go to the determination of the question were admitted—at least not contested; that the slight variation in the evidence given by the plaintiff was not any such variation as could be called a contest of fact. It is true that the evidence on the preliminary trial, at which the defendant Stewart was sworn, was filed, but this evidence was

not and could not have been read to the jury, and it cannot be argued, as is attempted to be done, that it forms part of the case submitted to the jury. It is evidence which is attached to the record filed with the clerk of the Court in his capacity as depositary of those records, and was simply used to prove that proceedings were taken before the magistrate and what was done upon those proceedings. So that the evidence there taken forms no part of the case tried here.

As to whether the trial Judge should have taken the case from the jury, I am of opinion that he would have been quite justified in taking the case from the jury at the close of the plaintiff's case, and himself finding upon the question of reasonable and probable cause. I am not prepared to say that he was not justified in adopting the course which he did. and in asking questions and getting the aid of the jury. Upon that point there is some doubt, but I think the weight of authority is decidedly in favour of the proposition that he should have taken the case from the jury upon the facts which were submitted on the plaintiff's side. Upon this I would refer to the cases of Archibald v. McLaren, 21 S. C. R. 593, 599, and Hamilton v. Cousineau, 19 O. R. 219; and the question of whether a case should or should not be taken from a jury is discussed very fully in Pring v. Wyatt, 5 O. L. R. 505; 2 O. W. R. 22, 321, and in Wilson v. Tennant, 25 O. R. 344. As I have already said, I am not prepared to say that the trial Judge erred in submitting the questions to the jury. There is authority in all the cases which I have cited both ways, that he may use his discretion, and that if he sees fit to get the aid of a jury in ascertaining the facts he has the right to do so. But I think in this case that there were no facts which should have been left to the jury to ascertain, that all the material facts in the case were not contested.

As to the question of whether the reasonable and probable cause should now be left to the jury, I am of opinion that it still is a question of law for the Judge to determine; that is, I am convinced upon the authorities that that is still the state of the law. It may be argued that it seems strange that it should be a question of law, that there can be no fixed principle of law in a matter of this kind, where the facts must differ very materially in every case and the circumstances, and that reasonable and probable cause being a condition of

mind moving the party is after all a question of fact; yet it is quite analogous to many other cases in which a Judge directs a jury that if they find certain facts in a certain way, that in law constitutes an offence.

Upon this question of reasonable and probable cause and the functions of Judge and jury, Archibald v. McLaren, already cited, is our leading authority in this country, and by it we are bound. Strong, J., in his judgment says: "The well-known case of Lister v. Perryman, L. R. 4 H. L. 521, had, as I have already supposed, settled the law, as regards this class of action, to be that the question of reasonable and probable cause was, although a question of fact, one to be determined by the Court and not by the jury. That in such cases the respective functions of the trial Judge and jury were these, that whilst the jury were to find all the facts from which the inference was to be drawn, yet that the inference itself deducible from those facts was one to be drawn, not by the jury, but by the Judge. This is certainly most clearly laid down in the case of Lister v. Perryman, and the apparent anomaly and exceptional character of the rule by which a question of fact was thus withdrawn from the jury, who, generally speaking, were judges of the facts, and left to be decided by the Court, occasioned expressions of surprise from some of the law Lords who, having been trained in Courts of equity or in the Scottish tribunals, had not been practically familiar with such questions. It has, however, been suggested in a litle book written by Mr. Stephens on the law of Malicious Prosecutions, that this rule of Lister v. Perryman was displaced by the decision in the case of Abrath v. North Eastern R. W. Co., 11 App. Cas. 247. Having repeatedly read this last mentioned case, and having also read Mr. Stephens's book, I am clearly of opinion that there is no warrant for this proposition. The Judge is entitled, no doubt, to the utmost assistance from the jury in finding the facts, and is entitled for this purpose to put questions to them in any form which his ingenuity may suggest, but he, and not the jury, is to make the deduction, and if he shifts the burden of doing so upon them, the case is not properly tried. And Lord Esher, M.R., thus states the law: "The question whether there is an absence of reasonable and probable cause is for the Judge, and not for the jury, and if the facts upon which that depends are not in dispute, there is nothing for him to direct the jury upon, and he should decide the matter

himself. If there are facts in dispute on which it is necessary that he should be informed in order to arrive at a conclusion on this point, these facts must be specifically left to the jury, and when they have determined in that way, the Judge must decide as to the absence of reasonable and probable cause." In this case the only dissenting judgment was that of Taschereau, J. Upon this point I would also refer to the Encyclopædia of the Laws of England, vol. 8, p. 88. And the reason why this is so seems to me to be apparent. Even supposing the jury were to find, as they have found in this case, that would not conclude the matter. I do not think that it can even be argued that from the answers to both these questions in the negative malice in fact can be inferred positively as a jury finding.

While it is proper that the jury find all the disputed facts, I yet think it is a much safer and wiser provision that the Judge should decide the question of probable cause. There has been cited the case of Baker v. Kilpatrick, 7 B. C. R. 150, as opposed to this view and as shewing that the asking of the two questions was sufficient. But it will be seen that in that case 4 questions were asked, namely, the two which were asked here and the questions, "Was the defendant actuated by malice or bad motive in the proceedings taken?" —to which the jury answered "cannot agree," and "Had the defendant any indirect motive in bringing the prosecution before the magistrate, and if so, what was it?" To this the jury said "Yes, to obtain recompense for the loss of his horse." From the answer to the last question malice might be inferred, and it might be inferred that the jury found malice, as malice has sometimes in the books been called indirect motive. We were also referred to Tanghe v. Morgan, 3 W. L. R. 146; but in that case also three questions were submitted, as follows: "Did the defendant take reasonable care to inform himself of the true state of the case?" "Did he honestly believe the case which was laid before the magistrate?" and, "Was the defendant actuated by any indirect motive in performing the charge?" To the first two the answer was "No," and to the third, "Yes." Hunter, C.J., said: "It is well settled that in an action for malicious prosecution the question of reasonable and probable cause is for the Judge to decide, and that any material facts which enter into the determination of the question are for the jury to pass on if in dispute. The questions submitted by the Judge

were those propounded by Cave, J., and approved by the House of Lords, in Abrath v. North Eastern R. W. Co. I do not, however, gather from the cases that it has anywhere been laid down that these questions are to be submitted in every case of malicious prosecution. If that were so, it would be to thrust every such action into a sort of bed of Procrustes, and in this particular case I am unable to perceive the necessity for the first question, as the defendant must have known all the material facts." This case does not support the contention of the plaintiff, and is no more than an authority upon the right of the Judge to submit such questions as he sees fit to the jury to aid him in arriving at a conclusion as to reasonable and probable cause.

Then as to the question of malice, there is no submission either in the question, or I take it, in the charge, that the jury are to find malice as a fact. In opening his charge the Judge said: "The plaintiff must prove certain things, that he was prosecuted, acquitted, and that he suffered damage, and that the defendant in the case who prosecuted him had no reasonable and probable cause for so doing." Further on in the charge he said: "The question for you to consider is whether Stewart, the defendant, when he entered that prosecution against the plaintiff, was actuated by dishonest motives, or whether or not he had a reasonable and bona fide belief in te course that he was taking, that is, that he bona fide believed that what he was doing was right and that there was reasonable cause, and the motive that actuated him in starting that prosecution must, in your opinion, be such motive as would reasonably move a man, a reasonable man, to institute such proceedings." Further on the Judge says: "If a reasonable man, under the circumstances, could come to the conclusion (reasonably come to the conclusion) that they were guilty of perjury, then, although he may have been actuated by feelings of ill-will against these people, still he would not be guilty; you could not find against him in this action, because he would have the right to prosecute them; but, if he had no grounds, if you were of the opinion that he had no reasonable grounds for supposing that they had done what was wrong, then the case would be quite different; malice would be presumed, and on that I need not deal with you." The Judge further says: "There is what is known as actual malice or spite and malice in law. Malice in law is something which would be inferred, in a case where a man

without any motive or ill-will, without any reasonable grounds, would lay an information against a man for the commission of a crime, without any reasonable grounds for doing so. In law he would be presumed to have done so maliciously; you must consider whether or not he had reasonable grounds."

With great respect I think the trial Judge was in error in charging in that manner, that malice in law could not be presumed upon the state of facts which he sets out, but that actual malice in fact would require to be proved and actually found by the jury. I think the Judge should have asked the jury to find malice in fact or have asked some question which would have been tantamount to that; that considering or deciding whether or not the prosecutor had reasonable grounds does not by any means settle the question of actual malice, and upon that point I would refer also to the Encyclopædia of the Laws of England, vol. 8, p. 88, and also to the case of Hicks v. Faulkner, 8 Q. B. D. 187, and Abrath v. North Eastern R. W. Co. (already cited), where it was held that even if the jury answer both the questions here submitted in the negative they are still to answer the question—"Was the prosecutor actuated by malice?" Also the case of Allen v. Flood, [1898] A. C. 1, 71. It is incumbent upon the plaintiff, before he can succeed in an action of this nature, to prove want of reasonable and probable cause and to prove malice as well: see Allen v. Flood, [1898] A. C. 181, and Pollock on Torts, where he says that "evil motive is material because the defendant's act is in itself of a wrongful nature and is privileged when done and only when done in good faith." Nowhere in the charge of the trial Judge is there any indication given to the jury of how he will find upon reasonable and probable cause, nor does he at the conclusion of the case specifically find reasonable and probable cause. He says that upon the answers which the jury have given he will find a verdict. I do not think that can be taken as a finding on his part of reasonable and probable cause. As I have already said, I think that both the things which have not been found must be found before any verdict can be entered in this case, and it seems to me that Hicks v. Faulkner, already cited, leaves no doubt upon this point. Further, I think that the charge of the trial Judge, although not indicating his views, would indicate this, that he himself would not have found want of reasonable and probable cause if he had had to

find it as a fact or as a conclusion of law from the facts, at least there is no indication in his charge that he has found or will find want of reasonable cause.

I am further of opinion that the finding of the jury was actually perverse upon the evidence; that upon the plaintiff's presentation of the case the defendant had reasonable and probable cause and such reasonable and probable cause as would move Stewart to believe in the justice of his own case. There was sufficient evidence as to his state of mind to convince the jury that he had faith in his own case, and no evidence to the contrary; there was the fact that he considered his property in jeopardy by the non-performance of the representation work; that he knew as a fact (admitted by the witnesses for the plaintiff) that the affidavit was false in fact; it was a reasonable conclusion to draw that where only $100 was paid for the performance of $300 worth of work, the work had not been done, and where it was clear that the affidavit stated that three-quarters of the work had been done through solid rock, whereas a very small portion had been done through solid rock, there was further ground for belief that perjury had been committed. That the Crown thought they could not succeed in bringing home the charge before a jury is no ground for thinking that a reasonable man might not conclude he had grounds for laying a charge of perjury, and if he had those reasonable grounds, then a verdict should not have been found against him, and for all the reasons which I have given I think the verdict should be set aside and a verdict entered for the defendant.

I was in some doubt whether it would be better to order a new trial, but it seems to me that the plaintiff put in his entire case, and a new trial would not elicit any new facts. This Court, under our Rules, has power to enter any verdict which ought to have been rendered at the trial, and on the authority of Alcock v. Hall, [1891] 1 Q. B. 444, Toulmin v. Miller, 12 App. Cas. 746, St. Denis v. Baxter, 15 A. R. 387, and Sibbald v. Grand Trunk R. W. Co., 18 A. R. 197, there is no doubt as to our power in that respect. The trial Judge might have withdrawn the case from the jury at the close of the plaintiff's case, and should have found that there was no want of reasonable and probable cause. That was a matter for himself to decide either before submitting the case to the jury or after the jury had answered the questions as they did.

MACAULAY, J.:—At the close of the plaintiff's case counsel for the defendant argued that on the plaintiff's evidence there were no material facts which enter into the determination of the question in dispute for the jury to pass upon, and it was the duty of the Judge, therefore, to decide the question of reasonable and probable cause, and consequently asked that the action should be dismissed. I was of the opinion, however, that there was a dispute as to material facts, and that the case should be left to the jury The defendant's counsel then decided to offer no evidence, and, after addresses being made to the jury by both counsel for the defendant and plaintiff, I charged the jury and submitted the following questions to them:—

1. Did the defendant take reasonable care to inform himself of the true state of the case?

2. Did he honestly believe the case which he laid before the magistrate?

I did not submit the third question, "Was defendant actuated by any indirect motive in preferring the charge?" as was submitted by Cave, J., in Abrath v. North Eastern R. W. Co., 11 App. Cas. 247, and approved by the House of Lords.

The answers to the two questions submitted to the jury being in the negative, I decided then that there was not reasonable and probable cause, and that malice in law was presumed, and gave a verdict for $770, the amount of damages assessed by the jury.

It was argued by counsel for the defendant (appellant) that there was no dispute on the facts, and that, consequently, I should have decided the question of reasonable and probable cause without submitting the case to the jury. I am still of the same opinion that I held at the trial, that there was such a dispute on the facts that entitled me to submit the case to the jury.

It was also argued before us, and raised as a ground of appeal, that the findings of the jury were perverse. I am not prepared to accede to this view, because I am of the opinion that the jury might reasonably have come to the conclusions at which they did arrive, although I think, had I been trying the case as a jury, I might have, and most probably would have, arrived at different conclusions than those arrived at by the jury.

The third objection taken was that I should have submitted the question of malice as propounded by Cave, J., viz., "Was defendant actuated by any indirect motive in preferring the charge?" I think it would have been better had the third question been submitted to the jury, but, in view of the fact that they answered both the questions in the negative, I am still of the opinion that malice in law must be inferred, and that, consequently, I was right in ordering that a verdict be entered for the plaintiff for the amount of damages found by the jury, on the answers they returned to the questions submitted by me to them.

In Baker v. Kilpatrick, 7 B. C. R. 150, the three questions above propounded were submitted to the jury. The first two questions were answered in the negative, and the answer to the third question was "Cannot agree." His Lordship held in that case that there was not a want of reasonable and probable cause, but stated that he would leave any questions counsel might desire to the jury, in case they should find for the plaintiff and the full Court should differ. After the answers to the questions had been submitted to him by the jury, he entered judgment for the defendant with costs. On appeal to the full Court his judgment was reversed and a verdict entered for the plaintiff. In that case the third question was submitted and no answer given to it, but the full Court were of the opinion that malice in law must be presumed.

In Tanghe v. Morgan, 3 W. L. R. 146, Hunter, C.J., in discussing the questions submitted by Cave, J., to the jury, says: "I do not, however, gather from the cases, that it has anywhere been laid down that these questions are to be submitted in every case of malicious prosecution. If that were so, it would be to thrust every such action into a sort of bed of Procrustes, and in this particular case I am unable to perceive the necessity for the first question, as defendant must have known all the material facts."

After reviewing these cases, while I regret that the question of malice was not included in the other questions left for the jury, I am still of the opinion that from their answers, as above stated, malice must be presumed, and that this appeal should be dismissed with costs.

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YUKON TERRITORY.

CRAIG, J. AUGUST 6TH, 1907.

CHAMBERS.

CANADIAN BANK OF COMMERCE v. WILSON.

Pleading — Delivery of Pleadings — Extension of Time — Peremptory Order—Application for Further Indulgence—Solicitor's Slip—Rule 555—Terms—Costs.

Motion by defendants the Hudson Bay Co. and others for an order extending the time for delivery by the applicants of their subsequent pleadings.

J. M. Carson, for applicants.

F. J. Stacpoole, for plaintiffs.

CRAIG, J.:—On 6th May of this year I made an order directing the defendants to file their subsequent pleadings before 1st July, and on 2nd July, on a subsequent application, an order was made granting a further extension of time to file and deliver subsequent pleadings, until 20th July, and this order was peremptory. Another application is now made for further time under the following circumstances. Mr. Pattullo, leading member of the firm of Pattullo & Tobin, the solicitors for the parties applying, by affidavit states that on 17th July he prepared the subsequent pleadings with the intention of filing and delivering them, but that he was on 18th July engaged as counsel in two cases before the Exchequer Court, then sitting in Dawson, and constantly engaged in those cases until after the time fixed

for the delivery of the pleadings; that he overlooked the filing and delivery; but that on 26th July instant he filed and served the pleadings on Mr. Stacpoole, solicitor for the plaintiffs; that he wrote to Mr. Stacpoole asking to have the service and filing allowed, and received a reply that on instruction from his clients service would not be accepted. The whole reason given for the neglect to deliver is personal oversight on the part of the solicitor. This is the material put in upon the application. The solicitor for the plaintiffs makes no answer beyond the fact that the order made for the extension of time was peremptory. There is nothing urged beyond that and the authority of some cases cited. The cases cited are those in Snow & Burney under Order 64, Rule 7, and Holmested & Langton, 1890 ed., p. 481, particularly the cases of Norris v. Beasley, Eaton v. Storer, 22 Ch. D. 91, and Earp v. Henderson, 3 Ch. D. 254. The plaintiffs do not suggest that they have suffered any inconvenience by the delay. The trial has not been delayed nor any other inconvenience occasioned. They are standing on their strict legal rights, whatever they are, and it apparently is a case where two firms of solicitors are at arm's length and not willing to concede anything to each other. In fact, counsel for the plaintiffs now states that he has suffered in the same way from the solicitors for the defendants. It is unfortunate that this feeling should exist between solicitors practising, when a little indulgence on both sides would facilitate very much the work of their respective offices. However, that is a matter which I cannot deal with any more than making this passing suggestion. I must deal with the matter strictly on the law. The power of the Court to enlarge is fixed by our Rule 555, which provides that "the Court or a Judge shall have the power to enlarge or abridge the time appointed by this Ordinance or the Rules of Court, or fixed by any order enlarging time, for doing any act or taking any proceedings, upon such terms, if any, as the justice of the case requires; and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed." The Rule is the same both in Ontario and in England, and all the authorities cited are applicable. In Holcroft v. Lowndes, 27 Sol. J. 296, —which reports we have not here, but only a short note of the case in Snow & Burney's Pleadings—it is said: "A peremptory order is a final indulgence, and a further extension after

such an order will only be allowed in a case of death or some equally exceptional circumstances." That seems to me to be a very harsh application of the Rule without some modification, and I think that the discretion of the Court is ample in the matter, where the ends of justice do not suffer by granting the indulgence. I think that is the sole consideration in all applications of this nature, particularly, as in this case where the time which elapsed was so very short—only 6 days—and no injury sustained and no inconvenience suffered. But, it being carelessness on the part of the solicitor, particularly as he had the aid of a partner, I think he should pay the costs of this motion forthwith (fixed at $20); and the order will be that additional time be allowed and that the service and filing already made be sufficient and be allowed as a service and filing of the subsequent pleadings.

YUKON TERRITORY.

CRAIG, J. AUGUST 9TH, 1907.

TRIAL.

DRABESON v. THOMPSON.

Lien—Miners' Lien Ordinance—Wood Supplied for Working Mining Claim—Mortgage— Priorities — Registration — Affidavit Attached to Lien—Sufficiency of Description— Date of Credit — Extension — Waiver of Lien—Time— Retroactivity of Ordinance—Postponement of Time for Ordinance Coming into Force.

The plaintiff claimed a lien under the Miners' Lien Ordinance for wood supplied for the purpose of working creek placer mining claim No. 3 A, Eldorado creek, namely, 25⅔ cords of wood at $12 a cord, amounting in all to $309. The wood was supplied between 27th November, 1906, and 25th February, 1907. The lien was filed in the office of the Gold Commissioner on 27th May, 1907, and the originating summons taken out on 1st June, 1907, and certificate of action, under the Ordinance, on 3rd July, and filed on the same day.

The only parties contesting the action were the mortgagees, the Canadian Bank of Commerce, who took a mortgage dated 30th June, 1906, and registered the same on 11th July, 1906.

F. J. McDougal, for plaintiff.

F. J. Stacpoole, for the Canadian Bank of Commerce.

CRAIG, J.:—The Miners' Lien Ordinance, which is an order in council, was passed on 26th May, 1906, and by sec. 25 thereof was to come into force on 1st July, 1906.

The plaintiff Drabeson proved delivery of the wood for the purpose of operating the mining claim, and the other matters are as detailed.

By the Ordinance, sec. 3, it is provided that "any person who performs any work or service upon or in respect to or furnishes any wood to be used in the working of any placer or quartz mining claim, shall, by virtue thereof, have a lien for the price of such work or service or wood upon the said claim, with the appurtenances thereof, the minerals or ore produced therefrom, the land occupied thereby or enjoyed therewith, or upon or in respect to which such work or service is performed, or for or upon which such wood is furnished, as well as upon the machinery and chattels of such land." Section 4 provides for the registration, and by sec. 6 it is provided that "any lien registered under the provisions of this Ordinance shall, as to an undivided one-half interest in the said mining claims, the appurtenances thereof, the lands occupied thereby or enjoyed therewith, and the machinery and chattels upon such land, and as to one-half the output from said mining claim, take priority over all mortgages and incumbrances against the same, provided that the lien registered under this Ordinance shall not have priority over mortgages or incumbrances registered prior to the passing thereof."

Another section which materially affects this action is sec. 9, which provides that "the claim may be registered at any time within 30 days after the last day's labour for which the wages are payable or on which the wood was furnished, or within 30 days after the time fixed for payment, or, if the labour is performed or wood furnished between the 1st day of November in any year and the 30th day of April in the following year, at any time within 30 days after the said 30th day of April." This latter section is most material to be

considered in the decision of this case, for it will be seen that the wood was furnished between the dates mentioned in sec. 9.

The first objection taken by Mr. Stacpoole, counsel for the mortgagees, is that the affidavit attached to the lien does not set out and contain a description under our Rule of the Judicature Act affecting affidavits. The affidavit simply gives the name and the address of the claimant. Section 7 of the Lien Ordinance provides the requirements for the document or claim of lien, and the following are the requirements: the name and residence of the claimant, the owner of the property to be charged, the work done or wood furnished, the sum claimed as due, the description of the property, the date of the expired period of credit agreed to. This is all contained in the claim of lien and is sufficient to establish his lien as conforming to the Ordinance up to that period. The matter was not before this Court until an originating summons was taken out. It is true that this affidavit is read in Court as part of the lien filed, but it strictly conforms to the wording of the Ordinance, and that is all that, in my opinion, is required up to that time. The affidavit upon which the originating summons was obtained does set out the address and description of the claimant, and I think that, even if the Rule were applied to the lien claim itself, enough is contained in it to shew the nature of the claim and the description of the party. However, it is not upon that point I decide, but upon the fact that the lien claim conforms to the Act or Ordinance.

It is further objected that the true date of credit is not mentioned, because it appears by the evidence that the wood was to be paid for, one-half cash, and the balance on 1st February or the end of March; that that was agreed to; that no money was paid, but, on the claimant demanding it, the owner, the defendant, said he could not pay then, but would pay not later than 1st May, which was the time of the cleaning-up of the gold, as he expected, and upon this the plaintiff went away and assented. No note was taken nor any security, nor was there any agreement to waive the lien.

It is argued on the authority of Edmunds v. Tiernan, 21 S. C. R. 406, that any extension of credit waives the lien, and it cannot be revived afterwards, and the mortgagees depend upon the judgment of Strong, J. But it will be observed, on a reading of that case, that a promissory note was taken and

discounted, and that the remedy and the right to bring the action on the lien were thereby suspended. In the concluding part of the judgment that learned Judge says: "Had the note not been negotiated by the appellant, different considerations might have prevailed." And the case of Ritchie v. Grundy, 7 Man. L. R. 532, is cited also by the mortgagees. I do not think that case is in point, upon the facts which I am considering. There certainly was no express waiver of the lien by Drabeson, and the time for registering his claim did not expire until 30 days after 30th April, and within that time he registered his lien. It is contended that he should have registered his lien within 30 days after the first agreed period for the expiry of the credit. The Lien Ordinance does not of itself create the lien, but only the potentiality of a lien, and, in my opinion, this section preserves that potentiality until 30 days after 30th April in a case where the wood is furnished between the dates mentioned in the section. The fact that the claimant agreed to get his money at an earlier date does not affect his right to lien under that section. He might have brought his action sooner, but the Act gives him the potentiality of acquiring the lien at any time within those days. It is true that in Sidback v. Field, in this Court en banc, ante 309, it was held that the agreed date for the expiry of the credit was the date from which to count for the registration of the lien, and that the parties could not afterwards extend the time of credit so as to extend the potentiality of lien or the recording of their claim under the Ordinance. That opinion I still hold, so far as it affects claims arising at any other date than between the dates mentioned in sec. 9 of the Ordinance. I think the meaning of the section is clear to those who understand the conditions in this country and the intention of the council in enacting as they did. Money from gold placer claims is not available until after the gold produced during the winter months is washed up in the spring; no money can be realized out of placer mining claims during the winter. Miners must wait until the spring months and the spring freshets to wash up their pay dirt, and for that reason the right to acquire a lien under the Act is extended until after that wash-up, which takes place just at the time provided for by the Act, namely, 30 days after 30th April. I think, therefore, that labourers and wood suppliers, no matter what agreement they may make with the owners or contractors between those dates for pay-

ment, still have the right on non-payment to acquire a lien by registering their claims within 30 days after 30th April.

It is further objected that under the same judgment of Sidback v. Field, this Act is not retrospective; that any contract made prior to the coming into force of the Act on 1st July is not affected by the Ordinance. I still hold to the judgment which I gave in that case, but I think this case is on an entirely different basis. The mortgage under which the bank claim is dated 30th June, the day preceding the coming into force of the Act, and between the time of the passing of the Act and the coming into force of it, and is not registered until after the Act comes into force. Section 6, already cited, provides for liens having priority over all mortgages to one-half the property in the claims and the gold output, but it specially provides that liens under this Ordinance shall not affect or have priority over mortgages registered prior to the passing. I take it that the passing of the Act was the date upon which was obtained the assent of the Governor-General, 26th May.

As to the effect of the suspension of an Act, as to whether it is retrospective or not, I fully considered that question in the same judgment of Sidback v. Field, and there expressed the view, which I now repeat, that a suspension of the operation of the Act, as in this case, in some cases makes the Act retrospective. I there referred to the cases of Moon v. Durden, 2 Ex. 22; Pardoe v. Bingham, L. R. 4 Ch. 735. I would further add to those references Ex p. Rashleigh, 2 Ch. D. 9, and Williams v. Harding, L. R. 1 H. L. 9; also Maxwell on Statutes, p. 311 et seq.; and the reasons which I gave in the judgment of Sidback v. Field. But, apart from the authority of these cases, I think the Act itself indicates the intention that all mortgages shall be affected by the lien to the extent of one-half the interest in the claim, and the only mortgages which are exempt from the operation of the Ordinance are those registered prior to the passing. The Act itself, it seems to me, can convey only one meaning, that it was the intention to affect mortgages executed prior to the coming into force of it, and between the date of its passing and the coming into force. It seems to me it can have no other meaning, and, although the contract of mortgage itself and the deed itself were executed before the coming into force of the Act, yet it must be taken that every Act or Ordinance—and this Ordinance has the effect of an Act of

Parliament—gives notice to the world from the date of its passing and affects transactions and contracts by parties between the time of its passing and its coming into force, and I do not think one has to go beyond the wording of the section itself, and I do not think any other interpretation is possible to be placed upon that section than the one I am placing upon it, that this mortgage, to the extent which I have named—one-half interest in the claim—is affected by this lien.

There will, therefore, be judgment for the claimant, the lien-holder, for the amount claimed, with costs as against the owner for the full amount of his interest in the claim, and as against the mortgagees to the extent of one undivided half in the claim.

YUKON TERRITORY.

CRAIG, J. AUGUST 13TH, 1907.

TRIAL.

YUKON CONSOLIDATED GOLD FIELDS CO. v. SCHMIDT.

Mines and Minerals—Water Grants—Construction of Ditch by Plaintiffs—Hydraulicing Placer Mining Claims — Location of Ditch—Plans and Surveys—Ditch Crossing Defendant's Claim — Trespass — Destruction of Flume —Waste of Water—Representation Work — Right of Grantee to Attack Grant to another—Rights of Defendant as Prior Locatee—Crown Regulations — Evidence — Injunction—Damages.

Action for an injunction and damages in respect of trespasses by defendant upon plaintiffs' mining claims.

J. B. Pattullo, for plaintiffs.

The defendant in person.

CRAIG, J.:—The plaintiffs are an incorporated company owning placer mining claims suitable for working by the hydraulic method and situate on the Klondike river, known

as the "Potato Patch Group," the "Charlotte Rosamond Group," and the "Tarantula Group," sometimes called in the evidence the "Acklen Group." To operate these properties it is necessary to bring water a great distance by means of ditches and flumes and piping. The original owners of these claims were Ellen Acklen and Douglas S. Mackenzie. The chain of title is not in question in the action, and by the records it appears that through various conveyances from these parties down to the present owners, the plaintiffs, the title is regular.

In the year 1903 Acklen and Mackenzie applied for a water grant under the regulations then in force, and obtained, on 23rd July, 1903, grant No. 5555, giving them the right to draw water from the head of Moose Hide creek along a marked line by the westerly side of the mountain to the north-east of Dawson, and thence southerly to these groups of claims.

By a subsequent grant issued on 24th January, 1907, the right was given to A. N. C. Treadgold, by grant No. 8121, to draw water from the same creek—Moose Hide—and tributaries named in the grant for use on the same placer properties, and by that grant the right was given to use the ditch already constructed known as the Acklen ditch. By the grant 5555, issued on 23rd July, 1903, the time limited for the completion of the ditch was two years. The evidence which we have of the completion of the ditch under grant 5555 is that in the subsequent grant 8121 the ditch to be constructed under the previous grant is spoken of as a ditch constructed. The ditch is identified both by the memoranda on the grants and by the evidence given, as being the same ditch or the Acklen ditch. We find on 21st July, 1903, that the grant 5555 is approved of by the Assistant Gold Commissioner, F. X. Gosselin, and by the then Commissioner, F. T. Congdon, in accordance with the regulations. We find on 14th May, 1907, re grant 5555, a letter from F. X. Gosselin approving of the plan, and stating that the ditch route has been approved, and the ditch completed in accordance with the terms of the grant. It will be observed that this date is 4 years after the issue of grant 5555. Nothing is produced and no evidence given of what occurred in the interim, and why the time originally fixed for the completion of this ditch has been extended for 2 additional years. The memoranda would seem to be inaccurate without some further explanation.

However that may be, the ditch was approved as completed, and the mining engineer, Mr. A. J. Baudette, writes a memorandum that the ditch has been completed under the grant, which memorandum is dated on 4th April, 1907; and we find entered on the books of the department by V. G. Grant, the proper officer, a memorandum of this approval of the completion of the ditch.

I may remark in passing that the defendant, who is a woman advanced in years, appeared in person and conducted her own defence. Most unfortunately for her, while she had a general notion of what she thought to be her rights, yet she had a very poor idea of how to present her case. She was, of course, unable to cross-examine the witnesses and unable to either test the weakness of the plaintiffs' case or to present the full strength of her own. I had repeatedly warned her on preliminary motions, both on interim injunction motions and on other matters coming before me, that it would be utterly impossible for her to present her case in all its strength to the Court without the aid of counsel. It was impossible for me to help her in any way, as the only help she could have got would have been a complete conduct of the case for her. It is regrettable that a case of this importance, both to the litigants and to the public at large, should have been presented in the manner in which it was by the defendant. However, that is not the fault of the Court, and it is not the duty of the Court to take charge of litigation and aid litigants who are not familiar with legal procedure and the statutes and authorities that they should cite.

We now in this case find two existing grants recognized by the Department, and at the time of the matters complained of the ditch was in active operation and water running in it for the purpose of hydraulicing the claims in question.

Mr. Baudette, the first witness called for the plaintiffs, says that in July, 1903, he made an examination and report upon the Acklen ditch, and that it was built upon the line shewn on the plan. The location of the ditch is perfectly established by Rufus Buck, a civil and mining engineer, who is familiar with the ground, knows the grants, and who ran the surveys. He ran the first survey for Acklen in 1903, and swears that the line of ditch conforms to the application and to the grant; that he traced the scout line which was run prior to the application, which was made 21st July,

1903; that in August following he ran a preliminary line and contour line, marking it every 100 feet, which followed closely the first line, and in 1904 commenced the location line and set the survey stakes; that the ditch is built exactly according to the plan which was put in, exhibit M.; that it crosses the Anlas mineral claim, the claim in question, and that one-third of the Anlas mineral claim is above the ditch line. We have also the evidence of D. G. Cleek, who helped in the preliminary survey and posted the applications of 1903, and he says that he posted notices within the bounds of the Anlas mineral claim, the one affected by this action, and that the present ditch conforms with the line then run. I must conclude then from the evidence that we have a ditch and flume line running from the point of diversion fixed by the application, and by the grant along the route marked in the application and plan and survey, and being appurtenant to the placer claims which I have mentioned and which are the claims affected by the application and by the grant, and that this ditch is now, or was at the time of the matters complained of, in full operation and working.

On the other hand, the defendant is the holder of a license or a grant or a right, whatever it may be called, to the Anlas mineral claim, across which claim this line of ditch runs. The acts complained of by the plaintiffs and against which they seek an injunction and damages are the cutting away of the supports of the flume and the blowing up and breaking down of the flume and the waste of water caused thereby. The Anlas mineral claim was staked and located prior to the application for the water grants in question, and the defendant claims by virtue of prior right. She also alleges that the grant of water right has lapsed, because of the failure of the plaintiffs or their predecessors in title to complete the same within the 2 years fixed by the grant. She objects that the renewals of the placer claims were obtained by virtue of work done upon these very ditches, and which were allowed as representation work upon the placer mining claims. If I understand her argument correctly, it is this, that, the time having expired within which the ditch ought to be constructed, any work done on that ditch after that date goes for naught, and cannot be used to represent the placer claims in question. By placer mining regulations then in force, "work done outside of a mining claim with intent to work the same, which has direct relation to and is in direct proximity to the claim, shall be deemed, if to the

satisfaction of a responsible government officer, to be work done on the claim for the purpose of representation." It was under this section that the work on the ditch was allowed as representation work on the claim, the contention of the defendant being that work which was done upon an expired grant could not, either in fact or in law, be taken to be work which should be applied for the legal renewal of a placer mining claim. I will deal with that contention now and dispose of it, as it seems to me to be one of the least importance in the whole case. I do not think I can in this action try the title of the plaintiffs to the placer claims which they hold. They are in possession of grants which appear to be regular on their face, and they take by regular chain of title. It is true that their right to the ditches depends on their right to the placer claims; when title to the placer claim is lost the grant of water right lapses which is appurtenant to such claim: but it seems to me that the holder of an independent mineral claim, being a quartz claim, cannot in this action, particularly in the way in which the matter is raised, and upon the present pleadings, attack the title of the plaintiffs to their placer mining properties, and impeach the grant which they have from the Crown. She must succeed upon the strength of her own title and her rights to interfere with the ditch, by virtue of her prior staking of her own mineral claim. Beyond that, it has been held by a majority of this Court en banc that only the Crown can attack an existing grant; that no free miner, a volunteer, not having an adverse right in the property in question, can attack such a grant in the manner in which this grant is sought to be attacked; and for the purposes of this action I must hold that the plaintiffs are legally entitled to the grants which they now hold in these placer properties, no evidence having been produced of the cancellation of the grants. The question for decision then is, what are the rights of the defendant as a prior locatee as against the grantee of water rights over her mineral claim?

The evidence of the trespass complained of is as follows. Dahnke, the foreman for the plaintiffs, says that on or about 1st May the flume was carrying water and the plaintiffs were doing hydraulic work on the claims; that he saw digging done at the foot of the posts which support the flume, and he found the flume broken and blown to pieces as if by some explosive, at a point near the waste gate, where a gate is put for safety in turning off water. Cameron, another witness,

saw the same break, and saw the defendant, with a man, working at the foot of the posts, which some have called batter posts; that the work was digging trenches up to the foot of these posts and exposing the bases of them; the posts had been erected on sills for greater strength and these sills at the foot of the posts buried some distance in the loose material which is at the point in question; all this loose material was taken away from the foot of these various posts and weakened very materially the flume which is carried along upon a sort of trestle; the excavations were not, in his opinion, in the nature of mining at all; they were not continued beyond the foot of the posts, and apparently just far enough to expose the posts, to weaken them and tend to make them fall. The witness spoke to the defendant, who replied that she did not care what damage she was doing; that she asked the witness to shut off the water so that she could throw down the flume. The witness, who was an employee of the company (the plaintiffs), told her he was just going to turn the water on, and she replied, "If the water is not turned off, something will happen." This same witness speaks of trouble had the fall previous while the ditch was being dug—that the defendant interfered with the digging of the ditch and prevented the workmen from carrying on the work. She said the company must come to her terms and she wanted $75,000. Another witness—Graham—saw the defendant coming out of the flume on 30th April of this year, when he was about 900 feet away, and then when within about 500 feet of the waste gate the water dropped out of the flume, and on going to the waste gate he found two boxes blown out as if by an explosive; that he could see no mining whatever at that point, and there was no mining at that point; that the waste gate was some 350 feet from the point where the defendant had been seen working under the batter posts. Coffey, the superintendent of hydraulicing for the plaintiffs, saw the break at the waste gate; says that this waste gate was built at a rocky point, where it could do no possible harm to the defendant's claim. Buck, the witness previously mentioned, also speaks of the damage done to the ditch. He further says that this is the only feasible route for carrying water along the line in question; that crossing this claim there is about 312 feet of ditching and 1,200 feet of fluming; at the point where the operations of the defendant were carried on, which she calls mining, the flume is supported on posts, being a sort of

trestle, and posts were put in every 8 feet; that it is very hard at that point to maintain the flume owing to the nature of the ground, and that the exposure made by the defendant very materially weakened the flume; that the actual damage caused by the breaking up of the flume would be about $40. and the additional cost of throwing back the dirt removed from the batter posts. Mr. Thomas, the manager and legal agent of the plaintiff company, and also a mining engineer, says that the total cost of this flume and ditch is about $75,000, not to speak of the cost of the Acklen property, the placer mines in question; that the property can only be worked by the hydraulic method and by water carried by this ditch; that the plaintiffs were actually operating at the time of the explosion and the damage on 1st May, 1907; that in the fall of 1906 the defendant spoke to him and said he would have to buy her out; that her claim was just worth what she would take out of it either by a sale to the company or by mining it; that at that time, the fall of 1906, she chased the men off the ditch and threw back the dirt which was dug out; that, if these acts are repeated, it will be impossible to estimate the damage, for the reason that it will stop the entire operations of hydraulicing, and the men engaged in the hydraulic plant will be thrown out of work; that repairs have to be made, and no water can be run or used while these repairs are going on. This witness examined the ground at the base of the posts where the defendant's operations were carried on, and he says there was no bona fide mining going on; that at that point it is all slide rock, and no ledge, vein, or contact is visible, and that there is no rock in place, and no indication of any contact. Mr. Perry, another mining engineer, and general manager of the company, gives evidence to the same effect.

The contention of the defendant is that she has a valuable asbestos mineral claim; that it can only be operated by open cutting, as she calls it, that is, by quarrying out the rock, crushing it, and extracting from it the asbestos fibre; that to do this she must necessarily interfere with the flume and ditch of the plaintiffs, whether she mines above the flume or below it; in mining below it and up to the point where she encroached on the flume she would necessarily knock it down; that if she must operate above it the rocks will roll down upon the flume and injure it.

Whether the defendant has or has not a valuable deposit of mineral in place, there seems to be no serious contest

upon that matter. The witnesses for the plaintiffs were sceptical as to what she had. But in the cross-examination which she made of them none of them could say that they had carefully examined the property in question, and none of them were in a position to deny that she had a valuable asbestos mineral claim, as she alleged. She had the government mining engineer in the box subject to her cross-examination, and did not see fit to press him upon that point. I am not aware whether he could have given any evidence or not. The other experts who were witnesses for the plaintiffs had not made any inspection such as a mining engineer should make to give proper evidence upon this point; apparently all they saw was seen upon a very cursory examination of the claim. Mr. Perry said that, in his opinion, asbestos mining would not pay in this Territory at that point, and that any asbestos mine in the Yukon Territory, to pay, would have to be very much richer than the best mines in the province of Quebec are to-day. The defendant did not go into the box herself, but she called a witness—Thurbur—who is the owner of an adjoining asbestos mine, and he says that the Anlas mineral claim, the one in question, is a valuable mineral claim and cannot be worked without damaging the flume. The defendant in her cross-examination repeatedly asked the question of the expert witnesses and the parties representing the plaintiffs if they could shew her how she could mine her claim and obtain the benefit of her property in any way without interfering with the plaintiffs' flume, and they all, or nearly all, answered that they believed the property could be worked to the fullest advantage by the defendant without interfering with the flume or damaging it in any way, and expressed their willingness to take care of their own property, that is, the flume and ditch, if the defendant carried on bona fide, legitimate mining upon a proper ledge. The defendant also seemed to think that the Court should direct in what way this asbestos mineral claim should be worked by her so as to save her from the plaintiffs and also from any action by way of injunction. I do not think it is the duty of the Court to give any such direction or to make any finding upon this matter whatever. My duty, it seems to me, is solely to find out what the legal rights of the parties are, and, having determined what those are, to decide whether I should or should not continue this injunction and award damages for the

wrongs complained of. In short, can the defendant legally justify her trespass on the strength of her prior location?

The plaintiffs claimed their right to water under the regulations passed in 1898. These regulations provide for the mode of application, what preliminary steps shall be taken, and what nature of grant shall be given, the number of years it should exist, and other matters necessary to be directed by the mining recorder or the officers in charge of the issuing of the grant. I must presume, because there is no evidence to the contrary, and the grant has been issued under the regulations, that all the preliminary steps were taken and were properly taken. These regulations, by sec. 11, provide as follows: "Any person desiring to bridge any stream, claim, or other place for any purpose, or to mine under or through any ditch or flume, or to carry water through or over any land already occupied, may in proper cases do so with the written sanction of the mining recorder. In all such cases the right of the party first in possession shall prevail so as to entitle him to compensation if the same be just." No evidence whatever was given under this section as to whether the permission of the recorder had been given to enter upon land already occupied or whether any provision had been made for compensation. Sections 14 and 15 also affect interference and compensation. The sections governing compensation contained in the regulations of 1898 are not re-enacted in the present Mining Act, and the present Mining Act repeals all former regulations; so that there now exists to-day no provision by statute or regulation for compensation in such cases.

Under sec. 2 of the regulations above referred to it is provided that "any person may protest the application within 20 days, but not afterwards." The quartz regulation in force at the time the defendant staked the mineral claim gives to the holder of the claim all rights to the surface; that is, section 33. Nothing is said in these regulations regarding the right of any person to cross a claim with ditches or watercourses. But these quartz regulations were subsequently amended by order in council of 16th September, 1904, which provides, in the amended form—see sec. 53 (c)—that all Crown patents issued for quartz mining claims situated in the Yukon Territory, shall be made subject to the town site provisions of the regulations governing the administration of Dominion lands established by order in council dated 26th July, 1900, and all such patents con-

veying the surface as well as the under rights shall reserve to the Crown forever such right or rights of way and of entry as may be required under any regulations in that behalf now or hereafter in force in connection with the construction, maintenance, and use of works for the conveyance of water for use in mining operations. I am of opinion that the regulations affecting the disposal of water being in force at the time of the staking of this mineral claim affect that staking, and whether the quartz regulations do or do not provide for a right of entry on the part of the Crown or the Crown's grantees for water ditches, the stakers of quartz claims are affected by those water regulations, and their grants are subject to them, particularly until they obtain a Crown patent, which this party has not, being only in possession of a license of occupation and a right to obtain the patent under the regulations, upon certain terms fixed and specified by the regulations. Then again, the patent, not having been issued, will be subject when issued to sec. 53 (c). The Crown has the right, under the authority of The King v. Kappelle, decided in the Privy Council, to make such regulations as it sees fit affecting mining claims already granted, and this mining claim will be affected by this amended regulation.

As I have said before, it is no part of my duty to say how this claim shall be worked in the future. These parties must work within their legal rights. It seems to me that the regulations provide a way by which this claim can be worked. I do not think it is my duty to say whether compensation can or cannot be still granted to the party for the crossing of the claim, whether or not an application for compensation should have been made at the time the entry was made upon the land. But it seems to me that the regulations, having provided for this very kind of thing both by way of leave by the recorders and inspectors and by a provision in regard to compensation, put it out of the power of any person holding a mineral claim to assert a title against a Crown grantee with the right to divert water and carry it across such properties. The remedy given by the regulations seems to be the only remedy contemplated by the legislative authorities, and to these remedies parties must resort for relief.

It is unfortunate that the defendant, a woman, defended in person, but I cannot go out of my way to give any

more explicit directions such as she asks for in regard to the operation of the claim. I must just simply say that she has certain legal rights, and to these she must resort; and being satisfied that the plaintiffs have a legal right to be where they are and to carry water by the ditch which they are using, I have then got to decide whether those rights have been infringed by the defendant or not.

Upon the whole case I am strongly of the opinion that the defendant was not carrying on bona fide mining. The blowing up of the flume was certainly not mining. It was done at a point where there was no appearance of mining at all, and it seems to me to have been wholly malicious. The cutting to the batter posts in the slide matter also seems to me to have been malicious. None of those who spoke of the matter can call it bona fide mining; in fact, they say it is not bona fide mining. And the whole of the evidence, both of the persons who did see the damage and the work and the evidence of the photographs produced, indicates that this excavation under the batter posts was done for the purpose, not of mining, but of throwing down the flume. Then again the attitude of the defendant in interfering with the work on the ditch last fall—her demand upon the company for the large sum of $75,000—looks like what we call in this country a "hold-up."

As to my right to restrain the defendant, I think there can be no doubt about that upon the law: see Derry v. Ross, 1 Morrison's Mining Reports 1; also Barringer & Adams, p. 717 et seq.; Gould on Waters, 3rd ed., pp. 778 and 796; Gas Light and Coke Co. v. Vestry of St. Mary's, 15 Q. B. D. 1, 6.

The difficulty in this case is to frame the order of injunction so as not to interfere with the rights of the defendant, and at the same time maintain the rights of the plaintiffs to the continuation of their ditch and flume. The defendant has a right to mine, but I think she ought to call in the assistance of the mining inspector or the proper officer under the regulations. The plaintiffs ought to abide by any order which he shall make for the proper carrying on of mining operations on the claim. The defendant must be restrained from acts such as she has been committing. The digging under the posts must be discontinued, or any acts which will interfere with and cause the collapse of any part of the structure of the flume or the ditch which carries the water.

I am convinced from the evidence that there can be no difficulty at all in both these parties carrying on their operations at the same time, and that any mining engineer competent to give advice can direct operations so that both parties can carry them on and neither be injured.

The injunction will be made perpetual against such acts as are proven to have been committed in this case, and there will be $100 damages awarded for the trespass committed, with the costs of the action.

The form of the final order may be spoken to at any time.

YUKON TERRITORY.

DUGAS, J. AUGUST 13TH, 1907.

TRIAL.

GALLIGHER v. BONANZA CREEK GOLD MINING CO.

Costs—Action Tried with Jury—Event—Good Cause for Depriving Plaintiff of Costs—Rule 525—Apportionment of Costs—Distinct Issues—Abandonment of one Claim—Costs of Interim Injunction Motion.

The plaintiff sued to recover damages from the defendant, alleging that large amounts of tailings, rocks, sand, gravel, and boulders, having passed through or over the defendant's workings and cribbings, had covered plaintiff's mining claim to such an extent as to make it practically worthless.

Henry Bleecker, for plaintiff.

J. B. Pattullo, for defendant.

DUGAS, J.:—The action was begun on 18th September, 1906. No particulars were asked for or given. General damages only, a restraining injunction, and a mandatory injunction, were prayed for. The case was heard before a jury, and, from the evidence, it soon became clear that the claim of the plaintiff was based upon 3 different incidents; one in the spring of 1906; another on 15th August, 1906; and a third one on 3rd May, 1907.

The particulars were established by the plaintiff through Mr. T. D. Green, Dominion land surveyor, who was one of the first witnesses examined, and his evidence fixes the basis

of the different claims of the plaintiff. He further estimates the full amount of the damages claimed at $6,502, of which $3,555 represents the damages alleged to have occurred in the spring of 1906. After the hearing of the whole evidence the plaintiff abandoned this portion of his action, reducing thereby his claim to $2,947, as damages incurred through the occurrences of the 15th August, 1906, and 3rd May, 1907. The verdict on this balance was $990.

The item abandoned represented the largest of the amounts claimed. A good deal of time was spent in examining witnesses to establish the same. The defendant applied to the Court as soon as the verdict was rendered to have the costs refused to the plaintiff, in view of the fact that only a limited amount of all that was claimed had been granted by the jury. The matter was afterwards argued in Chambers with the understanding by both parties that the judgment on the merits would be entered as of the date of the judgment on this application.

The following cases have been cited, which are only in confirmation of clause 3 of our Rule 525 (English Rule 966), in which it is declared that "in any action, cause, matter, or issue tried with a jury the costs shall follow the event, unless the Judge by whom such matter, cause, action, or issue is tried, or the Court, for good cause otherwise orders:" The Friedeberg, 10 P. D. 113; Badische v. Levinstein, 29 Ch. D. 419; Willmott v. Barber, 17 Ch. D. 744; Corporation of Bradford v. Pickles, [1894] 3 Ch.; Harris v. Petherick, 4 Q. B. D. 611; Harnett v. Vise, 5 Ex. D. 307; Marsden v. Lancashire and Yorkshire R. W. Co., 7 Q. B. D. 641; Jones v. Curling, 13 Q. B. D. 265; Hunter v. Carrick, 28 Gr. 489; Ferguson v. Frontenac, 21 Gr. 188.

The only question now before me is whether there is in this case good cause for the Court to order that the costs shall not follow the event of the case.

There is no doubt that it is generally accepted that, although a plaintiff may sue for more than will be granted to him by the final judgment, he may obtain, notwithstanding, the costs incurred according to the schedule of fees fixed for the amount recovered. It will be so if there is only one transaction which requires only one set of proof, but if the action is based upon several causes which require different proofs and different evidence, as if there had been different actions taken, then there is good cause to refuse the costs incurred in proving one or the other causes of action

upon which the plaintiff fails. In some instances the amounts found to be due were so limited compared to what was asked that the Courts refused to grant any costs, whilst in others the claim was so ridiculously high that the costs of both parties were made to be paid by the plaintiff, although he had succeeded in obtaining a verdict for a small amount.

The plaintiff principally relies upon the case of Jones v. Curling, above cited. In this case different closes were in the possession of the defendant. Neither the plaintiff nor the defendant knew which of them exactly belonged to them, but both were interested in some. As the verdict declared them to be proprietors each for about one-half, there the costs were, notwithstanding, granted to the plaintiff in full, as it was considered that it was an impossibility for any of the parties to say which of the closes belonged to them, and therefore the plaintiff could not be required to limit himself in his action to particular closes which belonged to him. This was considered a case where divisibility could not exist, and for this reason the full costs were allowed to the plaintiff.

I do not believe that this principle applies to the present case, as the plaintiff shews that his claim for damages is based upon three different facts, one of which occurred in the spring of 1906; one on 15th August, 1906; and the last one on 3rd May, 1907.

As I have said before, the largest claim was for the damages alleged to have occurred in the spring of 1906, the amount of which Mr. T. D. Green, the principal expert, fixed at $3,555. The reason of the abandonment was that, if damages were caused in the spring of 1906, it was due to vis major, for which the defendant could not in any way be held responsible. The plaintiff, in bringing his action, should have known this, and if afterwards he incurred costs and brought the defendant to incur costs, he to prove and the defendant to disprove facts upon which no claim could be based, the plaintiff is surely blamable and should be made to pay the costs of his unjustified action. It seems to me a case where the Court or Judge has the duty to intervene and protect a party for good cause against costs lavishly incurred.

Much of the evidence was to the effect of establishing those damages and to make the defendant responsible therefor. To say exactly what time has been spent in making that proof cannot mathematically be established to the cent, but

I think that as much time was spent, if not more, than on each of the two other items, and that by fixing at one-third the time spent for that purpose a just adjustment of the costs in that particular is arrived at.

Before the trial two applications for an injunction were made. The first one was suspended after an understanding with the parties, and I believe that the costs should go against the defendant upon that particular injunction.

On 4th May, 1907, after the accident of the 3rd, another application was made for an injunction based upon 7 affidavits produced. At the instance of both parties I was called to view the ground, and found that there was no cause then to grant the injunction, which I suspended, reserving adjudication upon it as to costs to be determined by the trial Judge. Presiding myself at the trial and having heard the evidence, upon the whole I have no hesitation now in saying that those 7 affidavits not only so grossly exaggerated the facts but were so grossly untrue, that the plaintiff ought to be made to pay the costs of that second application.

There will, therefore, be judgment as of this date for $990.75, the amount of the damages fixed by the jury, and the costs to be allowed the plaintiff will be only two-thirds of the amount fixed after taxation. This not to include the costs incurred upon the second application for an injunction, which is dismissed or set aside with costs in favour of the defendant.

YUKON TERRITORY.

CRAIG, J. AUGUST 28TH, 1907.

SINGLE COURT.

RE MORRISON.

Mines and Minerals — Placer Mining Act and Regulations — Application for Renewal Grant — Duty of Mining Recorder — Payment of Fee — Change in Regulations — Additional Fee — Waiver — Instructions of Department —Mandamus — Discretion.

Motion by Frank William Morrison for a prerogative writ of mandamus directed to the Gold Commissioner, being the

chief mining recorder of the Dawson district, and to William C. Noble, the mining recorder and renewal clerk, whose duty it was to renew mining claims upon application in conformity with the Placer Mining Act, to compel them to make renewal grants of creek placer mining claims Nos. 69 and 70 below discovery on Dominion creek.

F. G. Crisp, for the applicant.

E. C. Senkler, for the Commissioner and Recorder.

CRAIG, J.:—The claim 69 expired on 7th August, 1906, and claim 70 on 5th August of the same year. So that the argument which I shall use is equally applicable to both these properties. On 8th September, 1905, the work required by the regulations then in force was done and certificate issued to Pierre Ledieu, which gave a renewal to 7th August, 1906. On 3rd July, 1906, this claim was again renewed in the name of Pierre Ledieu from 7th August, 1906, to 7th August, 1907. On 3rd July, 1906, a bill of sale dated 23rd June, 1906, was recorded, conveying the property from Pierre Ledieu to Henry S. Tobin, and on 5th July of the same year a bill of sale from Tobin to Morrison, the applicant, was recorded upon 4th August, 1906. These dates will apply to both properties so far as the law is concerned. Morrison, the present owner, applying for renewal under the Mining Act, in August, 1907, is refused, and a demand is made upon him for payment of $5, based upon the following. Under the regulations in force at the time of the last previous renewal the fee for renewal was $10, and there was also charged a fee for the certificate of work of $2. Both these sums were paid, and the then applicant for renewal obtained his certificate, although the existing one did not expire until the 7th or 5th day of August, as the case may be, that is, for the convenience of the applicant for renewal, his certificate was granted before the expiry day, although not taking effect until then, and renewing the claim for a year from the real expiry date, namely, the 5th and 7th August. Before the renewal date, and on the 1st day of August, the existing regulations in force at the time of the obtaining of the renewal certificate were repealed, and the Placer Mining Act, ch. 39 of 1906, came into force, that is, on 1st August, 5 and 7 days before the expiry date of the claims in question. By that Placer Mining Act the fee for renewal is fixed at $15, and if the claims had been renewed

on the proper date of expiry, that fee was chargeable and would have been collected. The mining recorder now, on the return of the present owner asking for his renewal, insists on the payment of the money then short. It is clear from this that some one is indebted to the Crown in the sum of $3 under the regulations in force at the time of the expiry.

By sec. 41 (a) of the old regulations it is provided that "any free miner, having duly located and recorded a claim, shall be entitled to hold it for the period for which he received entry, and thence from year to year by re-recording the same." To re-record, the same work provided for by the regulations had to be done and an application for record made within 14 days after the expiry of the grant, and, in addition to that, the fees had to be paid, as I have mentioned.

It is now argued that, having obtained the grant, and the claims having passed into the hands of innocent purchasers for value, the Crown cannot now refuse to renew the grants and insist upon payment of the debt due by the former owner before such renewal is made, and that the miner has an absolute right of renewal. As to whether the miner has an absolute right to renewal or not, I take it that he only has that right in any case upon the performance of the duties imposed by the regulations. I will first consider whether the present owner is an innocent purchaser for value without notice. The title to these claims is one of record, and the actual date of the issue of the certificate appears upon the record. The purchaser must have known this, and he must further have known that the Act of Parliament which imposed the additional fee came into force before the expiry of the existing grant. So that I do not think he can be considered as an innocent purchaser without notice. In any case I do not think in law that that will avail him. It might seem on the first blush that a person in possession of a grant, however obtained, was legally entitled to hold that and resist the payment of any charge properly imposed upon the claim, if that charge did not happen to be collectable at the moment when he obtained his renewal grant; but the issue of the grant prior to the expiry date was simply done for the convenience of the applicant, and upon this point the judgment of the Privy Council in The King v. Kappelle is final. In considering the effect of a change in the regulations Lord Macnaghten, in delivering

the judgment of the Board, said: "In some cases it appears that for the convenience of the miner a renewal grant was issued during the currency of an existing grant. It was argued that the miner, having got possession of a renewal grant, was not liable to be affected by regulations not then in force, but coming into operation before the expiry of the existing grant. Their Lordships are unable to accede to this argument. Their Lordships think that the renewal grant must be subject to all regulations in force at the date when it comes into operation." This is exactly the case which I am considering. The renewal fee was increased to $15 before the date when the grant came into operation.

It is further argued that the mining recorder here, of his own motion, has no right to refuse the renewal of the grant and to take this mode of collecting a Crown debt. His authority for acting, and the only authority which he produced, is a letter from the Secretary of the Department of the Interior insisting upon the facts which I have stated, and saying: "The proper fee for the renewal of a claim which expired on and after the 1st day of August is $15, and must be collected." There is no direction as to how it shall be collected; whether the mode which the Recorder here has adopted is the mode intended or not, is not indicated. There is no doubt that the Crown could collect this debt against this claim by a process, if it saw fit to take that course. But is this person in any better position in asking for his renewal than a person having a renewable lease? Would not the lessor under a covenant to renew be entitled to refuse to renew if the rent or any part of the rent had not been paid for the past year, and would not that right affect even an assignee of the term? If that is the law in regard to a private individual, it is equally strong in regard to the rights of the Crown. I think that the annual fee is in the nature of a rental chargeable to the miners, and because the person in possession of the claim obtained his grant or got possession of a renewal grant which he should not have got, and which was not operative until 7th August, he should not therefore escape the statutory obligation of paying the full annual rental or charge.

It is argued that the Crown has waived the right to collect the additional fee by the issue of the grant, but I cannot accede to this argument. There could be no waiver without knowledge, and the facts upon which waiver can be

raised did not come into existence until some time after the renewal grant was issued.

It is further argued that, supposing a person had taken out a grant for 5 years, as can be done under the regulations, paying the full fee in advance, could the Crown upon the change in the regulations increasing the fee, cancel that grant and insist upon a further payment? It seems to me that that is an entirely different case. There the Crown saw fit to grant for 5 years upon a fixed fee. In this case the lease or license of occupation was a yearly one and expired yearly. The present Act, sec. 41, provides that "any person having duly located a claim may obtain a grant thereof for 1 or 5 years by paying to the mining recorder in advance the fees prescribed in schedule D. to this Act." Sub-section 2: "Such person shall, upon receiving such grant, be entitled to hold the claim for the period mentioned therein, with the absolute right of renewal from year to year thereafter upon the payment of the renewal fee prescribed in the said schedule." This is not the same as the regulations in force at the time this certificate was obtained, upon which renewal is sought, but it is the law which was in force at the time when the grant expired—the grant which is now sought to be renewed. And it will be seen from this quotation from the Act that the payment of the fee is a condition precedent to the renewal.

The matter which gives me my main difficulty is whether the mining recorder should adopt this mode of collecting the debt, whether he has any authority to adopt this mode of collecting the debt, whether, even if he had a direction from the Minister of the Interior or from any of the officers of the Department of the Interior at Ottawa, he could adopt this mode. He certainly has not received any instructions to withhold the grant, but of his own motion has, in obedience to the order to collect the arrears, withheld the grant or the renewal of it. I have already held that letters from the Department have no effect upon the administration of the placer mining regulations, and they would certainly have much less force in affecting the operation of the Placer Mining Act. The mining recorders here have statutory duties to perform, and if the miner when applying for his renewal has complied with all the statutory requirements entitling him to renewal, he has an absolute right to renewal. But I think the mining recorder is as much a guardian of the Crown revenue as the Department at Ottawa is, and the

question for me to decide is whether he is justified in guarding the Crown revenues in the manner in which he has attempted to do so. I think he is. There is certainly a debt of $3 at least due to the Crown, and I do not see that the prerogative powers of the Court should be invoked in the way of mandamus for so small a sum, and if I were in any doubt upon the matter I should not grant a writ. In this connection I might refer to Cumming v. Forrester, 2 J. & W. 334, 22 R. R. 160, where the Master of the Rolls says: "The difficulty I have felt has been upon a subject not much pressed by either party relative to the rights of the Crown and the effect of a Crown grant being made under a mistake; but I shall be glad to be relieved from this, and it is not the interest of the parties to turn the plaintiff round upon this point, which would only render it necessary to apply for a new grant. I would rather consider the case upon the merits freed from this difficulty, and from the jealousy with which the law regards questions involving the rights of the Crown. The power of calling back its grants when made under a mistake is not like any right possessed by individuals, for when it has been deceived the grant may be recalled notwithstanding any derivative title depending upon it, and those who have deceived it must bear the consequences, but that is foreign to the merits. The parties do not wish to raise the objection, and I do not feel bound to raise it, for it is not a case where the Crown has any substantial interest; if it had, the Court would protect it, and would require that the Attorney-General should be made a party." I think the Crown has an interest in this matter, particularly when I am advised that some 700 cases of a similar nature are outstanding. I have a discretion in the granting of a prerogative writ, and, when I know that a debt is owing to the Crown which can be collected in this expeditious manner, I do not think I should use that discretion to uphold the contention of the applicant in such a case. I think that this, being Crown revenue, should be protected, and I will not aid the debtors of the Crown in escaping from the liability by granting a writ of mandamus to compel the recorder to issue the grant. I think, however, if my judgment will enable this matter to be settled and to close up what is a vexatious thing and enable the miners to get on with their work, that if the fee of $3, the balance due, is paid, then there will be no justification for the mining recorder refusing the renewal grant. I do not see

on what grounds the Crown can claim the $5. At the time the renewal grant was obtained, the fee was $10 for certificate and $2 for certificate of work. Now the fee for certificate of work is abolished, and the total fee is $15. It is admitted that, at any rate, the Crown has in its hands $12 in cash belonging to these parties applicable to the payment of the $15 fee. Therefore, only $3 remains unpaid, and if this fee had been paid or tendered, then I would have felt bound to order the issue of the renewal grant.

There will be no costs to either party.

NORTH-WEST PROVINCES.

(CALGARY.)

JULY 17TH, 1907.

FULL COURT.

INGS v. ROSS.

Principal and Agent—Agent's Commission on Sale of Land — Agent Bringing Vendor and Purchaser together — Land Subsequently Sold on Terms Different from those on which Agent Authorized to Sell—Pleading—Amendment.

Appeal by plaintiff from judgment of HARVEY, J., at the trial, at the conclusion of plaintiff's case, dismissing the action, which was brought to recover $1,000 for commission upon the sale by plaintiff of defendant's ranch, on the ground that plaintiff had failed to shew that a sale was made upon the terms upon which he was authorized to make it.

W. L. Walsh, K.C., for plaintiff.

J. E. Varley, for defendant.

The judgment of the Court (SIFTON, C.J., WETMORE, SCOTT, and STUART, JJ.). was delivered by

SCOTT, J.:—The case disclosed by the evidence for the plaintiff is, that he told the defendant that he expected from the other side some persons with whom he had been

corresponding, and asked him to list his ranch with him. The latter did so, stated the price was $10 per acre, and told plaintiff that there was $1,000 in it for the man who made the sale. One Anderson, who was acting as agent for defendant under a power of attorney from him, also made a similar statement to the plaintiff, and referred him to Mr. Varley, the defendant's solicitor, for the particulars of the property. The plaintiff obtained these particulars from Mr. Varley, and shortly afterwards he met at Nanton, where he resided, one Moir from Iowa, who had a letter of introduction from a person there with whom plaintiff had been in correspondence.

Plaintiff, with his own team and with a livery team hired by him at Nanton, drove Moir and the others who accompanied him to the defendant's ranch, which they then inspected. On the second day afterwards plaintiff saw defendant at High River, and told him that the party he had been expecting had been taken by him to defendant's ranch, but it does not appear that he referred to any person by name. Moir and those who accompanied him afterwards opened negotiations with the defendant, which resulted in the latter selling his ranch to them at $10 per acre, but there was included in the sale horses and farm implements to the value of $1,000. How these chattels came to be included in the sale of the ranch appears from the examination for discovery of the defendant, who states as follows: "They (the purchasers) asked me, when they talked about buying the place, if there was any commission on this. I said, 'There is no commission, I have an agreement with certain people that I pay so much money if they make a sale for me.' They said, 'There is no commission to be paid if we buy, and throw in these farming implements, and you will be saving your commission.'" It would thus appear that the purchasers were endeavouring to defeat any claim upon the defendant for commission and to obtain the benefit of it for themselves, and that he fell in with their view. That he relied upon the purchasers' statement that no commission would be payable by him appears by his statement of defence, in which he alleges that, upon the representation of the purchasers that there was no commission due or payable to any one in connection with the sale, he turned over and transferred to them the chattels referred to. The reasonable deduction from the evidence is that the sale of the ranch alone would have been completed at $10 per acre had not the defendant

been led to believe by the representations of the purchasers that he would not be liable for any commission on the sale.

Even if there was not a sale of the ranch alone at $10 per acre, it does not appear from the evidence that the plaintiff was not to be entitled to his commission unless a sale was concluded at the price. Plaintiff states that when defendant listed the property with him he stated the price to be $10 per acre, and upon plaintiff asking him what the commission was to be, he replied, "There is no commission, but there is $1,000 for the man who makes the sale of my ranch." And Anderson states merely that the price was to be $10 per acre and $1,000 for the man who made the sale.

In Mansell v. Clements, L. R. 9 C. P. 139, the owner of a property placed it in the hands of plaintiff for sale at a certain price. One Upton, hearing of the property through the plaintiff, inspected the premises and offered the defendant a sum less than the price at which it had been listed with the plaintiff. This offer was refused, and the negotiations were broken off for a time, but they were afterwards renewed and the defendant accepted Upton's offer, the plaintiff never having interfered or been consulted. It was held that plaintiff was entitled to a commission on the sale notwithstanding that the sale was for a lower price. Keating, J., says, at p. 143: "In ninety-nine cases out of a hundred the services performed by a house agent upon these occasions are of the slightest possible kind; it consists for the most part in merely bringing the vendor and purchaser together so as to result in a sale."

In Toulmin v. Millier, 58 L. T. N. S. 96, Lord Watson says: "If A. had no employment to sell, express or implied, he could have no claim to be remunerated. If he was generally to sell, and thereafter gave an introduction which resulted in a sale, he must be held to have earned his commission, although he did not make the contract of sale or adjust its terms, because he had in that case implemented his contract by giving the introduction, and his employer could not defeat his right to commission by determining his employment before the sale was effected. . . . When a proprietor, with a view of selling his estate, goes to an agent and requests him to find a purchaser, naming at the same time the sum which he is willing to accept, that will constitute a general employment, and, should the estate eventually be sold to a purchaser introduced by the agent, the latter will be entitled to his commission, although the price

should be less than the sum named at the time the employment was given."

In my view it was not necessary that the plaintiff should have personally introduced the purchasers to the defendant. There was no such introduction in Mansell v. Clements. All that appears to be necessary is that the agent should be the means of bringing the vendor and purchaser together, and the evidence in this case shews that it was through the plaintiff that the purchasers and the defendant were brought together. It is reasonable to assume that the defendant knew this, even though the plaintiff admits that, when informing the defendant that he had taken out some persons to the ranch, he did not mention their names. The information given by the plaintiff at that time was such as should have put the defendant upon inquiry as to whether the purchasers were those to whom the plaintiff referred.

In my opinion the appeal should be allowed, and a new trial ordered. Plaintiff should have the costs of the appeal, and the costs of the first trial should be costs in the cause.

Upon the hearing of the appeal, plaintiff's counsel applied for leave to amend his statement of claim in manner similar to the amendment allowed by this Court in Boyle v. Grassick, 2 W. L. R. 285. I am of the opinion that such amendment should be allowed.

NORTH-WEST PROVINCES.

(CALGARY.)

JULY 17TH, 1907.

FULL COURT.

RE SANDISON.

Will—Construction—Legacies to Infant Children—Provision for Maintenance—Shares Payable at Majority—Death of Some before Majority—Shares not Vested—Survivorship among Children.

Appeal by Amy Sandison, widow of Charles Sandison, deceased, from order of HARVEY, J., upon an originating

summons, determining certain questions arising upon the will of the deceased.

James Muir, K.C., for the appellant.

N. D. Beck, K.C., public administrator.

The judgment of the Court (SIFTON, C.J., WETMORE, SCOTT, and STUART, JJ.), was delivered by

STUART, J.:—The deceased, by his will dated 10th March, 1905, after appointing two executors, made the following provisions for the disposition of his property:

"I give all my property, both real and personal, unto my said trustees in trust to convert the same into money, whenever and at such times as my said trustees shall think proper, and to invest the proceeds in any manner they may deem best, with power to vary such investments at their discretion; and to pay the income from such investments, or any income arising out of my estate, to my children for their proper maintenance and education, or to such as are under age. Should the said income not be sufficient, then my said trustees are to use such portions of my estate as they may deem best for such support and education. Should there be any surplus from the income of my said estate, my said trustees are to invest the same as they deem best.

"I desire my trustees to divide all my estate share and share alike among my children, and to pay to each of my sons on attaining the age of 21 years or my daughters on attaining the said age of 21 years, or marrying, his or her share. Provided that such share or shares can be paid without in any way being injurious to the rest of my estate, and in arriving at the proportion due to each child I wish my trustees to take into consideration the amount that would be necessary to maintain and educate any child or children that may be under age at the time of making the payment of any share to any child or children. Should none of my children survive me, I direct my said trustees to give all my estate at such time or times and in any manner they may deem best to such educational or charitable institutions in Edmonton as they may select."

The testator left him surviving 5 infant children. Subsequently 2 of the children, viz., Charles Joseph Sandison and Eaton Arthur Sandison, died, as it would appear, with-

out having married and without having attained the age of 21 years.

Amy Sandison, the widow of the deceased, then applied to my brother Harvey to have it determined: (1) what interest, if any, the deceased infant children took in the deceased's estate; (2) what interest, if any, the personal representatives of the deceased are entitled to in the said estate; (3) what interest, if any, the applicant is entitled to as one of the next of kin of the deceased children; (4) when the said representatives or the applicant are so entitled, if at all; and (5) whether the said representatives or the applicant are entitled to such portion or interest, if any, in specie.

Mr. Justice Harvey decided that under the true construction of the will the interest of the deceased children had not vested at the time of their death, but that the period of vesting of the interests of all the children was postponed until they respectively attained the age of 21 years; and that the applicant, therefore, was not entitled to any share in the testator's estate.

From this judgment the widow appeals.

I am of opinion that the judgment was right and that the appeal should be dismissed. It was urged very strongly that in endeavouring to arrive at the intention of the testator, as expressed in the first sentence of the second paragraph above quoted, the Court should make a distinct pause after the word "children," and should treat the clause "I desire my trustees to divide all my estate share and share alike among my children" as constituting, by itself and apart from the succeeding words, a clear gift of the estate to the children, and should look upon what follows only as postponing the time of payment. If I could admit the propriety of so dealing with the testator's words, I should have then no difficulty, under the authorities, in holding that the interests of the children had vested immediately upon the testator's death. But the well known rule is that the will must be read as a whole, and it seems to me that this rule should apply with still greater force when we are dealing, not with the whole will, but with a single sentence of it. If it is not allowable to cut the whole will up into pieces in order to interpret it, surely it is still less allowable to cut a sentence up into pieces, in trying to arrive at its meaning. Reading the whole

sentence, therefore, together, I feel confident that the intention was that there should be no "dividing" until the time came to pay. In view of the provisions of the other portions of the will, it is very clear that there could, at any rate, be no real dividing in any tangible sense until that time. Up to that time there could only be at best an imaginary division. I think that the testator used the word "divide" with the idea that it had a real meaning, and, therefore, that he must have intended it to refer to a division at the time when payment was to be made, and when a very large portion at any rate of the expenses of education and maintenance had been ascertained. It may be said that when the eldest child reached the age of 21 years he would be entitled to his share, and that, unless all the shares were then vested, his share might subsequently be increased by the death of a child who was still under age; and it may also be said that the share of the eldest would still be uncertain by reason of the necessity of spending further sums in the maintenance and education of the younger children. But I think the will leaves it in the discretion of the trustees, when they come to decide on the share of the eldest, to reserve any sum they see fit for the latter purpose before making the division, and the fact that a younger child might still die before reaching 21 would, I think, not be sufficient to prevent them from making a real, although not necessarily a final, division in order to decide on the amount of such share. I think, therefore, the sentence must be read as meaning that the trustees are to divide and pay at the same time, and that it is not allowable to separate the first part of the sentence from the remainder in order thereby to establish a present gift. This being so, I think the learned Judge was right in refusing to distinguish this case from the other cases such as In re Parker, 16 Ch. D. 44, where there was a simple direction to pay. I cannot discover any sensible distinction between a direction to pay a fund to the members of a class in equal shares when they attain a certain age and a direction to divide the fund among the members of the class and to pay each one his share on attaining that age. A direction to pay in equal shares, it seems to me, necessarily implies in any case that a division must take place at least immediately before the payment, and that is all I can gather, from the words of the sentence I am discussing, that the testator meant in this case. This conclusion is, I think, greatly strengthened

by the provisions of the first clause of the will. The whole estate is there treated as a single fund the income of which the trustees are directed to apply in the maintenance and education of the children. There is no suggestion whatever that the corpus is to be divided into a number of shares, and that the income from each share is to be applied in the maintenance and education of the child to whom it belongs. The absolute discretion given to the trustees to use the whole income as they see fit, or to use even a portion of the corpus if necessary for the maintenance and education of the children generally, seems to me entirely inconsistent with the supposition that the testator had in mind a division of the estate into aliquot parts immediately upon his death. The very fact, moreover, that all this is provided for by the testator first, before making any mention of a division at all, and that it is not until he comes to deal with the question of payment that he speaks of a division, is an additional evidence to my mind that the division was not intended to operate at the beginning.

The case is clearly one to which the principle laid down in In re Gossling, Gossling v. Elcock, [1903] 1 Ch. 448, must be applied. This case was decided by the Court of Appeal, and is a much later one than any of those cited by the appellant. I think it must, therefore, be taken to express the view of the law, upon such cases, which is now entertained by the Courts in England; and, although the interests in that case were held to have vested, yet it will be observed that, as in Fox v. Fox, so in the case referred to, the testator had used the expression "the presumptive share" of each child, and had given directions as to maintenance or advancement out of such "presumptive share."

The only point which has given me any real difficulty in the case is suggested by the provision at the end of the will that "should none of my children survive me, I direct my trustees to give all my estate . . . to such educational or charitable institutions in Edmonton as they may select." It was argued that the inference to be drawn from these words is that the testator intended that if even one child survived him even for a short time, and whether such child attained the age of 21 or not, he would take the estate. The will, however, is evidently rather carelessly drawn, and I doubt very much whether the testator intended by that clause to do anything more than to do his best to see to it that his wife should get no part of his estate; and, that

being so, I think the real inference to be drawn is that he intended to create a right of survivorship among his children. At least I think this latter inference can as easily be drawn as the former one, and it is, I think, more consistent with the first part of the will wherein the testator directs the maintenance and education of his children generally out of the general fund.

The appeal will, therefore, be dismissed and the order of Mr. Justice Harvey affirmed, but, as the interpretation contended for by the appellant was one to which the will was fairly open, and as the difficulty was caused by obscure language used by the testator himself, the costs of this appeal, as well as of the proceedings below, should be borne by the estate.

NORTH-WEST PROVINCES.

(CALGARY.)

JULY 17TH, 1907.

FULL COURT.

REX v. CANADIAN PACIFIC R. W. CO.

Lord's Day Act—Prosecution of Railway Company for Breach of—Leave of Attorney-General Required by sec. 17—Condition Precedent to Jurisdiction of Magistrates—No Evidence before Magistrates of Leave Granted—Motion to Quash Conviction — Notice to Magistrates — Rules of Court.

On 9th July, 1907, the defendants obtained a rule nisi, returnable on 16th July, before the full Court, to shew cause why a certiorari should not issue to remove a conviction made against the defendants by John Risk and A. E. C. McDonell, justices of the peace, at Clareshom, on 22nd May, 1907, for that the defendants did permit their employees at Claresholm to carry on part of the business of the corporation in their yards on Sunday 24th March, 1907, in violation of the provisions of an Act respecting the Lord's Day, and why the conviction should not be quashed.

The rule was obtained on some 11 grounds, the 5th of which was that the conviction and the proceedings did not properly shew that the leave of the Attorney-General for

the province of Alberta had been obtained before the prosecution was commenced.

R. B. Bennett, K.C., for defendants, upon this ground, cited Abrahams v. The Queen, 6 S. C. R. 1; Regina v. Bray, 9 Cox C. C. 215; Regina v. Heane, 9 Cox C. C. 433; Thorp v. Nall, 66 L. J. Q. B. 248; Re Gallard, 65 L. J. Q. B. 199.

N. D. Beck, K.C., for the Attorney-General and the magistrates, took the preliminary objection that no notice had been given to the justices of the intended application for the summons, and also shewed cause.

The judgment of the Court (SIFTON, C.J., WETMORE, SCOTT, HARVEY, and STUART, JJ.), was delivered by

SIFTON, C.J.:—This is an application for a certiorari to bring up a conviction against the defendants made by John Risk and A. E. C. McDonell, justices of the peace, under the authority of sec. 15 of the Lord's Day Act, being the clause referring to breaches of the Act by corporations. The application was made to this Court, in accordance with the Rules of this Court, without notice to the magistrates, and on their behalf objection was raised that the law in England as it was in 1870, which was made law in this country by the North-West Territories Act, provided for 6 days' notice of such an application. The Rules of this Court made in 1900, however, explicitly do away with the necessity of such notice, and those Rules were passed under the authority of sec. 533 of ch. 29, Dominion statutes of 1892, known as the Criminal Code, which expressly gives power "to make Rules not inconsistent with any statute of Canada." I therefore think the power to make such Rules is beyond question, and the application was properly made without notice.

In regard to the application itself, numerous grounds were stated and argued, but, in view of my opinion in regard to one of the points raised, it will be unnecessary to refer to the others.

Section 17 of the Lord's Day Act is as follows: "No action or prosecution for a violation of this Act shall be commenced without the leave of the Attorney-General for the province in which the offence is alleged to have been committed, nor after the expiration of 60 days from the time of the commission of the alleged offence."

The leave herein provided for is without question a condition precedent to the commencing of a prosecution, and is necessary before the magistrates would have jurisdiction to start the proceedings by taking an information. In the present case no proper evidence of such leave having been granted was given to the magistrate. This was practically admitted by counsel for the magistrates, who offered an affidavit, to which was affixed a copy of a letter written by the Deputy Attorney-General at Edmonton to the Assistant Commissioner of Police at Regina, by which he assumed to give the leave of the Attorney-General for the bringing of this and other proceedings. I have serious doubts as to whether the Deputy Attorney-General could give leave in such a roundabout manner, provided he is authorized to give it at all, which is open to question; but it is not necessary to decide that question, as there is no doubt that this letter was not brought to the attention of the magistrates, and, as the question is one of jurisdiction on the part of the magistrates, new evidence cannot be taken by this Court to bolster up the lack of evidence before the magistrates, and therefore the affidavit and exhibits are inadmissible for the purpose for which they were tendered.

My opinion, therefore, is that a certiorari should issue to bring up the conviction, and that, on such certiorari being returned with the conviction, the conviction should be quashed.

NORTH-WEST PROVINCES.

(CALGARY.)

JULY 17TH, 1907.

FULL COURT.

CLARK v. CITY OF CALGARY.

Municipal Corporations—City of Calgary—Special Charter—Non-applicability of Municipal Ordinance—Nonfeasance—Non-repair of Highway—Accumulation of Snow and Ice—Personal Injuries from—Action for—Dismissal.

Appeal by plaintiff from judgment of HARVEY, J., 5 W. L. R. 292.

James Short, K.C., for plaintiff.

John S. Hall, K.C., for defendant.

The judgment of the Court (SIFTON, C.J., WETMORE, SCOTT, and STUART, JJ.), was delivered by

WETMORE, J.:—This action was brought to recover damages for the alleged neglect by the defendants to remove snow and ice from one of the sidewalks in the city, in consequence of which the plaintiff suffered an injury. Assuming that it was the duty of the defendants to remove snow and ice from such sidewalks, were they liable to a civil action for omitting to do so, if an injury was caused in consequence of such omission?

What now constitutes the city of Calgary was formerly the town of Calgary. It was incorporated as a city by Ordinance No. 33 of 1893, which I will hereafter call the "charter," a portion of sec. 1 of which is as follows: "Provided further that the corporation of the municipality of the town of Calgary shall not be deemed to be dissolved by this Ordinance, but the same shall always be deemed to be the same corporation as that known hereunder as 'The City of Calgary.' And provided further that the said corporation or 'The City of Calgary' shall not be by virtue of this Ordinance relieved from any duty, obligation, liability, or indebtedness heretofore or now owing, existing, or due to any person, persons, or corporations by reason of or by virtue of any Act, statute, law, or Ordinance, contract, or proceeding, heretofore passed, existing, or in force."

It was urged that sec. 87 of the Municipal Ordinance, C. O. ch. 70, applied to the city of Calgary. That section is as follows: "Every municipality shall keep in repair all sidewalks, crossings, sewers, culverts, and approaches, grades and other works, made or done by its council, and on default so to keep in repair shall be responsible for all damages sustained by any person by reason of such default, but the action must be brought within 6 months after the damages have been sustained."

The Municipal Ordinance in force at the time of the enactment of the charter was ch. 8 of the Revised Ordinances, and sec. 275 of that Ordinance is exactly the same as sec. 87 of the Municipal Ordinance just quoted. The correct question to consider is whether sec. 275 of the last mentioned Ordinance was made by the charter applicable to the city. If it was, I am of opinion that this action could properly be maintained. I am rather inclined to the opinion that the portion of sec. 1 of the charter hereinbefore

quoted was merely intended to cast upon the city the financial obligation, or obligations of a like character, for which the town of Calgary was liable at the time of the passing of the charter, and was not intended to practically incorporate into the city's charter sec. 275 of the Municipal Ordinance then in force, or any portion of that Ordinance. Taking the whole purview of the proviso into consideration, it seems to be more aimed at the carrying over against the city the liabilities, etc., which, at the time of the passing of the charter, existed or had accrued against the town in favour of any person or corporation, and the performance by the city of any present duty which the town at the time was bound to carry out as regards any person or corporation, or which such person or corporation had at such time the right to claim or enforce as against the town. It did not intend to introduce the provisions of the Municipal Ordinance so as to create any subsequent duty, obligation, liability, or indebtedness against the city. I do not deem it necessary, however, to express a decided opinion upon this question, in view of the conclusion I have reached.

The charter contains very full provisions for the government of the city and for laying out and controlling its streets, for constructing and controlling sewers, drains, ditches, and watercourses, and for building and repairing sidewalks, and for removing snow and ice from sidewalks. Section 117 provides that the city council may pass by-laws for, among other purposes:—

"(22) Laying out, opening, and changing, closing, building, extending, and maintaining highways, roads, brioges, streets, lanes, alleys, and by-ways."

"(28) Controlling and constructing sewers, drains, ditches, watercourses, and preventing the obstructing of same, building and repairing sidewalks."

"(44) For compelling people to remove all snow and ice from the roofs of the premises owned or occupied by them and to remove and clear away all snow, ice, dirt, and other obstruction from the sidewalks adjoining such premises, and also to provide for the cleaning of sidewalks adjoining vacant property of non-residents, and the property of any other persons who for 24 hours neglect to clean the same, and, in case of non-payment of the expenses thereof by the owner or occupant, charging the same against the property as a special assessment."

Then sec. 158 provides as follows: "Every public street, road, square, or other highway within the city shall be vested in the city and shall be kept in repair by the corporation, and such public street, square, lane, or highway shall not be interfered with in any way or manner whatever by excavation or otherwise by any person or corporation, whether such person or corporation now enjoys or heretofore has enjoyed or exercised such powers or not, except such person or corporation shall first have made application to and received permission from the council in writing, and such permission shall state the amount of and manner in which the required work is to be done, and shall be strictly complied with."

This last section, in vesting in the city the streets, roads, squares, and highways, and requiring the corporation to keep them in repair, embraces all that was required to be done in so far as the repairing is concerned by sec. 275 of the Municipal Ordinance hereinbefore mentioned, because repairing the streets, roads, squares, and highways, embraces and includes repairing the sidewalks, crossings, sewers, culverts, approaches, and grades. I can nowhere discover in these enactments or any other portion of the charter any enactment giving a right of action for default to keep in repair any such works. I cannot bring my mind to the conclusion that this provision was left out because the legislature intended that sec. 275 of the Municipal Ordinance was applicable.

The recital in the charter is as follows: "Whereas the mayor and council of the corporation of the municipality of the town of Calgary have by their petition prayed that the name of the said corporation be changed to 'The City of Calgary,' and that the Municipal Ordinance and all amendments thereto be repealed so far as they affect the said corporation, and that all necessary municipal powers be granted to 'The City of Calgary.' . . .

"And whereas it is expedient to grant the prayer of the said petition."

No doubt, the recital is no part of the enactment, but it can be referred to for the purpose of ascertaining the intention of the legislature, where such intention is not otherwise as clear as it might be.

In view of this recital and the very full provisions of the charter and the general character of them, I am of opinion that the provision relating to the right of action was omit-

ted from the charter deliberately, and that sec. 275 of the Municipal Ordinance referred to does not apply to the city since its charter, and that no corresponding section of a similar character in any subsequent Ordinance is applicable.

It is clear that the act complained of is a nonfeasance; and in Municipality of Pictou v. Geldert, [1893] A. C. 524, Municipal Council of Sydney v. Bourke, [1895] A. C. 433, and City of St. John v. Campbell, 26 S. C. R. 1, it was held that a corporation such as the defendants' is not liable to a civil action for negligence by way of nonfeasance, unless authority is given by the legislature to maintain such an action. And, as the provisions which were in the old Ordinances are not applicable to the city, as I have set forth, there is no such authority to bring an action against the defendants for such a cause.

But it was urged that this case was distinguishable from the 3 cases which I have cited, because there was a duty or obligation cast upon the defendants by sec. 158 of their charter to repair the streets, etc. But in Municipal Council of Sydney v. Bourke the Lord Chancellor in giving judgment, p. 443, recognizes the law to be that the casting upon a corporation of the mere duty to repair does not give a right to a civil action. He is reported as follows at p. 443: "In the series of cases, ending with Cowley v. Newmarket Local Board, in which it has been held that an action would not lie for non-repair of a highway, the duty to repair was unquestionable, and it was equally clear that those guilty of a breach of this duty rendered themselves liable to penal proceedings by indictment or otherwise; the only question in controversy was whether an action could be maintained. The ground upon which it was held that it could not—even where the duty of keeping the roads in repair had been in express terms imposed by statute on a corporate body—was, that it had long been settled that, though a duty to repair rested on the inhabitants, subjecting them to indictment in case of its breach, they could not be sued, and that there was nothing to shew that the legislature in transferring the duty to a corporate body had intended to change the nature or extent of their liability.

I am of opinion, therefore, that the judgment of the learned trial Judge was correct, that his judgment must be affirmed, and this appeal dismissed with costs.

BRITISH COLUMBIA.

(VICTORIA.)

IRVING, J. MAY 28TH, 1907.

FULL COURT. AUGUST 1ST, 1907.

SINGLE COURT.

FULL COURT.

RE MOLONEY AND CITY OF VICTORIA.

Municipal Corporation—Liquor License Regulation By-law—Powers of City Council—Municipal Clauses Act, 1906—Application for Renewal of License—Power to Compel License Holder to Apply before Expiry of Original License—Regulating Character of Premises on which Liquor Sold—Clause Prohibiting Women Customers—Closing of Saloons during Certain Hours—Application to Hotels—Ultra Vires—Sale of Liquor during Prohibited Hours—Liquor Traffic Regulation Act.

Motion by Moloney to quash by-law No. 503 passed by the council of the city of Victoria in 1907, regulating liquor licenses.

F. Higgins, for the applicant.

W. J. Taylor, for the city corporation.

IRVING, J.:—In my opinion, the provincial legislature by sec. 205 of the Municipal Clauses Act, 1906, has conferred on the city council full authority to prescribe the conditions imposed by the by-law in question.

By sec. 184, the board of license commissioners is forbidden to issue licenses (which expression includes the granting of a new license, the transfer or renewal of a license) unless, prior to the granting of the new license, or the authorization of the transfer or renewal, the applicant has fully complied with the provisions of any by-law passed under its authority with reference thereto, that is to say, with reference to the issuing of licenses, using that expression as above set out.

The by-law in question seems to me to do exactly what was intended by the legislature should be done by the council. It instructs the board as to the conditions upon which they can grant, and informs the applicants of the terms upon which they can obtain and hold, a license or a renewal or transfer of their license. According to Lindley, L.J., this is the proper duty of a by-law: London Association of Shipowners v. London and India Docks, [1892] 3 Ch. 242, 252: "A by-law is not an agreement, but a law binding on all persons to whom it applies, whether they agree to be bound by it or not. All regulations made by a corporate body, and intended to bind not only themselves and their officers and servants, but members of the public who come within the sphere of their operation, may be properly called 'by-laws.'"

As to the suggestion that certain clauses of the by-law are unreasonable, the general considerations which ought to be borne in mind in dealing with this question were stated by Lord Russell, C.J., in Kruse v. Johnson, [1898] 2 Q. B. 99: "I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws, made under such authority as these were made, as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different clases; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive and gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires.' But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular Judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some Judges may think ought to be there. Surely, it is not too much to say that in matters which directly and mainly concern the people of the county, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than Judges. Indeed, if the question of the validity of by-laws were to be determined by the opin-

ion of Judges as to what was reasonable in the narrow sense of that word, the cases in the books on this subject are not guides, for they reveal, as indeed one would expect, a wide diversity of judicial opinion, and they lay down no principle or definite standard by which reasonableness or unreasonableness may be tested."

And by Sir Francis Jeune, p. 104: "Three considerations appear to me to apply with especial force to such an authority, dealing with such subject-matter. First, the case is wholly different from that of manorial authorities, or of trading corporations such as dock or railway companies, who often have a pecuniary interest in their by-laws, or even of such a municipal corporation as might be supposed to have trade interests involved. Secondly, such an authority as a county council must be credited with adequate knowledge of the locality, its wants and wishes. Thirdly, the opportunity afforded by legislation for a request for re-consideration, and an appeal to higher authorities, by members of the public, shews that any by-law which comes into force has secured at least the acquiescence of those whom it affects. Cases may be imagined in which, in spite of these considerations, this Court, acting in the discharge of its undoubted powers and duty, might feel compelled to hold a by-law made by a county council invalid on the ground that it was unreasonable. But, when a question of the requirements and wishes of the locality is involved, this Court should, I think, be very slow to set aside the conclusions of the local authority."

Then, as to the argument that certain matters dealt with in the by-law were already dealt with by Parliament, I extract the following from the judgment of Sir Francis Jeune in Thomas v. Sutters, [1900] 1 Ch. at p. 16: "If a by-law provided that something should be legal which the public law had declared to be illegal or vice versa, it might well be said that the by-law could not set itself up against an Act of Parliament. But there is nothing of that kind in the present case. As the Master of the Rolls has pointed out, the Act of 1867 deals with traffic regulation, and it provides that three or more persons assembled together in a street for betting shall be deemed to be obstructing the street. That provision was intended solely for the purpose of keeping the streets clear. It may be said that the present by-law goes beyond that, but I cannot see any objection to it even if it does go somewhat beyond that Act.

An Act of Parliament speaking for the whole country renders certain things illegal. It does not at all follow that a by-law speaking for a particular locality may not make some more stringent regulations with the same object. That, as it seems to me, is perfectly within the competency of the local authority. When an Act of Parliament has forbidden certain things to be done in certain places. it seems to me perfectly consistent with that that a municipality, with regard to their particular locality, should go somewhat beyond the Act, not contravening its spirit, but carrying it out, and making regulations somewhat wider than those to be found in the Act. That is really what has been done in this case."

The application to quash is refused.

The applicant appealed to the full Court.

F. Higgins, for the appellant.

D. M. Eberts, K.C., and C. D. Mason, for the city corporation.

The judgment of the Court (HUNTER, C.J., MORRISON, J., CLEMENT, J.), was delivered by

HUNTER, C.J.:—The by-law was impugned on a considerable number of grounds both below and here, but I will deal only with those which require to be noticed.

Clause 3 of the by-law provides as follows: "Upon information had of the infraction of any of the regulations herein contained by any holder of a retail liquor license, any licensing commissioner or the board may, and at the request of the council by resolution the board shall, cause at least 7 days' previous notice in writing to be sent to the holder complained of, requiring him to attend the next regular court of licensing commissioners, and there make application for an order of renewal of his license on the expiry thereof."

This was assailed on the ground that it was not competent to enact a law requiring a license holder to make an application for renewal before its expiry, on the ground that a complaint had been made againt him for infringing the regulations; in other words, that he had a vested interest in the license until the time came for renewal, and that it was only on an application for renewal that he could be

deprived of the license. It is unnecessary to say more on this point than that sub-sec. (d) of sec. 205 of the Act of 1906 seems clearly to authorize the regulation in question.

Clause 5 is clearly a clause regulating the character of the premises in which liquor may be sold, and may be supported under sub-sec. 100 of sec. 50 of the Act.

Clause 6 was attacked so far as it prohibits female customers. If the prohibtion is understood to be confined to the supplying of liquor to females to be drunk on the premises, I think it may be supported under sub-sec. 91 of sec. 50 (the prevention of vice clause); but, if it purported to prevent the purchase of liquor by women to be taken away from the premises. then I think it would be ultra vires. I think, however, that it is intended to apply only to the case of females consuming liquor on the premises, and therefore that it is intra vires.

Clause 7, which orders the closing of saloons during certain hours, was also impeached.

The only portion of the Act which in terms deals with closing licensed premises is sub-sec. 122 of sec. 50, which empowers the "ordering and enforcing the closing of saloons during such hours of the night and on Sundays as may be thought expedient." It is obvious that this does not empower the closing of hotel bar-rooms at any time, or the closing of saloons during any other hours or days than those specified, but it was argued that the more general provisions of the Act empowering the regulation of licenses supplied the needed authority. If that were so, there would have been no need for sub-sec. 122 at all, but I think it cannot be denied that when the legislature enacted sub-sec. 122, the subject of closing especially engaged its attention, and that it advisedly abstained from extending the power to hotel bar-rooms and closing saloons at other hours. It would have been easy to insert "and hotel bar-rooms" after "saloons," and "and holidays" after "Sundays," and to have said "such hours," instead of restricting it to "such hours of the night," if such was the intention; and, as stated in Hayes v. Thompson, 9 B. C. R. at p. 253: "There are obviously good reasons for keeping saloons closed during Sundays, and the late hours of the night, which do not necessarily apply to hotels, as the hotel is the home or the house of the guest while he stops there, and he may be in the bar-room during such hours for perfectly legitimate

social purposes, or with a view to his own comfort and convenience."

And I might add, to order the closing of bar-rooms would in the case of some hotels where the bar-room is the only available sitting room, very seriously incommode both the proprietor and his guests. A power to regulate the sale of liquor may be derived naturally and easily from a general authority to regulate liquor licenses, but a power to order private buildings to be closed either in whole or in part is a power of very drastic character, importing a power to interfere with the private use and enjoyment of property, and is not, I think, to be inferred from the use of general language, when in the same Act there is a clause specially dealing with such a power.

There is, moreover, the circumstance not to be overlooked that no unmistakable change in the law on this subject has been made since the decision in Hayes v. Thompson, which took place in 1902.

I think, therefore, that clause 7 is invalid so far as it requires the closing of saloons outside of the hours between sunset and sunrise on week days and during the day on Christmas Day and so far as it applies to hotels.

Clause 9 is, I think, within the scope of the authority conferred by sec. 205.

So far as concerns clause 13, it is of course invalid so far as it purports to enforce the invalid portions of clause 7, and it would also be invalid pro tanto if it purported to penalize the sale or the disposal of liquor during prohibited hours, which is expressly provided for by sub-sec. 1 of sec. 7 of the Liquor Traffic Regulation Act, but I do not gather that this was the intention.

The position in short is (as explained in Hayes v. Thompson) that sec. 7 of the Regulation Act is an enactment relating to the sale or other disposal of liquor during prohibited hours, and not to the closing of the premises, and the only enactment empowering the closing of the premises is sub-sec. 122 of sec. 50 of the Municipal Act, and if this is kept in mind there ought to be no difficulty in framing a by-law that will, in these matters at any rate, be within the limits of the powers conferred. With the question of the policy or expediency of any particular provision the Court has, of course, nothing to do.

Other points were suggested rather than argued, but, as Mr. Higgins was not concerned to argue them in the interests of his client, it is unnecessary to discuss them.

As both parties succeed in part and fail in part, there ought to be no costs either here or below.

MANITOBA.

MATHERS, J. SEPTEMBER 25TH, 1907.

TRIAL.

MAWHINNEY v. PORTEOUS.

Sale of Goods—Default in Payment of Price—Vendor Retaking Goods—Action for Deficit after Re-sale—Acceptance of Goods—Liability for Price—Breach of Warranty —Counterclaim — Damages — Measure of — Cost of Repairs—Promissory Notes—Addition of Parties—Amendment—Set-off.

The plaintiff sold the defendant a threshing outfit, consisting of a new separator and a second-hand engine. The order for the machinery was on a written form, containing a special warranty, which was stricken out. The engine was warranted to be in first-class repair and in good running order. The outfit was delivered to the defendant about the latter end of August, 1906, and he used it throughout that season. The plaintiff was at the defendant's farm on 1st September, on which day the outfit was set up and started to thresh. The defendant then gave the plaintiff a settlement, consisting of several promissory notes, and a chattel mortgage upon the outfit, collateral thereto. The price of the outfit was $2,500, and the notes taken in settlement were: $600 due 1st November, 1906; $800 due 1st November, 1907; $800 due 1st November, 1908; and $300 due 1st November, 1909: with interest at 7 per cent. and 10 per cent. after due. The payments under the mortgage were made to fall due at the same time as the payments on the notes, and it also contained the usual acceleration clause in case of default. After the defendant had been working

the machine for about 3 weeks he paid the plaintiff $40 on account of the freight on the outfit to Arden, which by the terms of the contract the defendant should have paid, but which was paid by the plaintiff. The defendant made no other payment, and in April, 1907, the plaintiff resumed possession of the outfit, and, after spending a considerable sum in painting and repairing it, resold it for $2,260.

This action was brought upon the first note to fall due, for $600.

Defendant counterclaimed against plaintiff for damages for breach of warranty.

E. Anderson, for plaintiff.

A. B. Hudson and A. Meighen, for defendant.

MATHERS, J.:—At the trial I permitted the plaintiff to amend by claiming, upon the covenant in the mortgage, the deficit after crediting the proceeds of the re-sale of the outfit.

I find as a fact that the engine was not in first-class repair when delivered to the defendant, but that he nevertheless accepted it. He is, therefore, liable for the purchase price, and is entitled to recover against Mawhinney damages for the breach of warranty. The particular defect complained of was the "friction." This is part of the mechanism by which the traction machinery is brought into operation. This part of the engine was so badly out of repair that it could not be properly used, and after some time its use was abandoned. The defect in the friction did not wholly disable the defendant from using the engine as a traction engine. By means of a pin through the driving wheel it could be operated quite well, except that when setting the machine, preparatory to threshing, it was not so convenient, and some time would thereby be lost. The defendant became aware of the defect in the "friction" as soon as he received the outfit. The defective part could have been procured in 2 or 3 days and put in at a cost of about $10, but the defendant took no steps to have the defective part replaced. The governors did not work properly, but there is nothing to shew what it would have cost to replace them. The cross-head was out of repair, as were also the brasses on the connecting rod. To replace these would have cost $20. It is complained that the fly wheel was worn, that the road wheel wobbled, that the grates were

worn, and that there was a cog broken in the drive wheel. I do not think that the fly wheel, road wheel, or grates were worn more than would be expected in the case of a second-hand engine. Because it must not be forgotten that it was a second-hand engine which the defendant bought, and that he was paying about $850 less than he would have had to pay for a new engine. It was also alleged that the crown sheet was sprung, but I do not think the evidence bears that out.

The last defect complained of is a cog broken in the drive wheel. This particular defect was not mentioned by the defendant to the plaintiff, or while he was giving evidence before me, and was not referred to at all except by one of the defendant's witnesses, who says he noticed this broken cog the day the machine was received by the defendant. Whether or not this defect did exist when the machine was delivered, it does not seem to have affected the operation of the engine in the slightest degree, and there is no evidence as to what a new wheel would cost.

The defendant gave evidence of considerable loss from the defective working of the machine by reason of the lack of repair mentioned, and I am satisfied that if the machine had been, as warranted, in first-class repair, the defendant would have been able to make considerably more profit than he did make, and that numerous expensive delays would have been avoided. The defendant, however, discovered nearly all of the defects complained of before he started the machine to thresh, and the others almost at once after starting. He knew that the defective parts could have been replaced promptly and at small cost, but he continued to operate the machine in its defective condition, without complaint of any kind except as to the friction. The plaintiff saw the defendant several times, and on several other occasions sent experts to assist the defendant, but the only serious complaint he made to any of them was as to the friction.

Under such circumstances what is the measure of his damage? As stated by the Ontario Divisional Court in Crompton and Knowles Loom Works v. Hoffman, 5 O. L. R. 554, 2 O. W. R. 273, "he is not allowed to sit still with his hands folded and allow the profits the machine would have earned to run on against the price." The defendant was bound to act as a reasonable man and to do whatever he reasonably could do to minimize his damage. There can be no

recovery for damage which might have been prevented by reasonable efforts on the defendant's part: 8 Am. & Eng. Encyc. of Law, 605; Joyce on Damages, 1288.

In my opinion, the defendant was bound, as soon as he discovered the defects complained of, to take the necessary steps to remedy them, and he cannot recover anything for damages beyond that he could save sustained had he pursued that course. This is in accord with the decision of the Chief Justice of this Court in Sumner v. Dobbin, 16 Man. L. R. 212, 3 W. L. R. 382. In the latter case it is stated that the defendant returned the engine on finding it unsuitable, and, no doubt, the time during which the engine was retained was not thought to have been unreasonable for the purpose of testing it, and the damage awarded was necessarily confined to that period.

In my opinion, the measure of the defendant's damage is the amount that it would have cost to put the machine in the condition it was warranted to be in, plus his loss of profits, or from delays during the time that would necessarily elapse before these repairs could be made, had the defendant acted promptly after discovering them. The onus was upon the defendant to prove his damage, but no evidence was given as to the cost of any of the repairs mentioned except the cross-head and friction, and I am not at liberty to guess at what they would cost. The bill for the repairs put upon the outfit after the plaintiff repossessed it was put in, and it was argued on behalf of the defendant that I should adopt the amount of that bill as the cost of putting the machine in the repair warranted. The bill amounts to $416.71, but it does not appear from the bill itself, nor was there any evidence given to explain, what the items going to make up that sum were for, with the exception of 2 or 3 items. It does appear that part of the amount charged was for painting, which was rendered necessary by the defendant leaving the outfit exposed to the weather during the winter. I do not think I can assume, on that evidence alone, that it would have cost $416.71, or any sum, to put the outfit in repair when the plaintiff got it. I must hold that the defendant has failed to discharge the onus upon him beyond the cost of repairing the cross-head and friction, namely, the sum of $30. The defects in the cross-head and governors were not discovered until he began threshing. Had he acted promptly, 3 or 4 days would have elapsed before these defects could have been

repaired. For his damage in operating during this time I allow $50—or in all $80 for damages upon the counterclaim.

The plaintiff sold the outfit, after repairing it, for $2,260. His claim against the defendant at that time was, with interest, made up as follows:—

Purchase price	$2,500.00
Interest	161.93
Cost of loading	10.00
	$2,671.93

In addition to this, it is said that he paid $416.71 for repairs in order to put the outfit in saleable condition. Whatever was spent in necessary repairs he is entitled to deduct from the amount received upon the re-sale: Abell v. McGuire, 13 Man. L. R. 454. In this case, however, there is no evidence that this sum of $416.71 was spent for necessary repairs. There is nothing to shew what repairs were actually made, or what the repairs made consisted of, and I have nothing to go upon but the bald fact that a bill for $416.71 for repairs is produced. This, to my mind, is not evidence upon which I can possibly find that this sum was properly spent for necessary repairs to that outfit. In fact the evidence of the machinist under whose supervision the repairs were made would go a long way to create a doubt as to whether or not any such sum was actually spent.

The only items that from the evidence before me I can find are proper charges, are freight from Arden $18 and painting $30, and these are all I can allow. This brings the plaintiff's total claim to $2,719.93.

It is said the plaintiff paid a commission of $250 on the re-sale. There is no evidence that the sale was made through an agent, or, if it was, what the proper commission would be. The only evidence as to this item at all is that of the plaintiff, who says he had to pay a commission of $250. That evidence, in my opinion, falls a long way short of proving his right to charge that commission against the defendant, and I refuse to allow it.

The plaintiffs the Bank of Commerce will recover the difference between $2,719.93 and $2,260, namely, $459.93, and costs of suit. The defendant upon his counterclaim will recover $80 and costs of the counterclaim against the plaintiff.

When the evidence was all in, it was pointed out that the note sued on was indorsed payable to the Bank of Commerce, and on application of the plaintiff's counsel I allowed the bank to be made a party plaintiff, upon the production of their written consent.

By the word "plaintiff" throughout, I mean the plaintiff Mawhinney, unless it appears the bank is meant.

There will be a stay of proceedings as against the plaintiffs the Bank of Commerce, until they consent to a set-off of the amount recovered under the counterclaim.

MANITOBA.

PERDUE, J.A. SEPTEMBER 25TH, 1907.

TRIAL.

SIMON v. SINCLAIR.

Promissory Note—Forged Indorsement—Action against Ostensible Indorser—Proof of Forgery—Estoppel by Conduct—Previous Action on Forged Indorsement Undefended—Representation of Genuineness of Indorsement.

Action on a promissory note against makers and indorsers.

C. P. Wilson and R. G. Affleck, for plaintiff.

C. P. Fullerton, for defendant James Omand.

No one appeared for the other defendants.

PERDUE, J.A.:—The note sued upon is dated 23rd October, 1905, and is for $485, payable one month after date. The defendant James Omand, whose name appears upon the note as an indorser, alleges that he did not indorse or authorize the indorsement of the note. The evidence clearly shewed that Omand did not indorse the note, but that his name was put on it, without his authority, by one S., who negotiated it to the plaintiff.

The plaintiff had filed a reply to Omand's defence, alleging that the latter was estopped by his conduct towards the plaintiff from denying the indorsement, and that the defend-

ant had so acted before the taking of the note as to lead the plaintiff to believe it had been indorsed by him, and that the plaintiff acted upon this representation. At the trial objection was taken to this reply for the want of particularity, but I allowed plaintiff to amend by alleging all acts and matters relied on as establishing an estoppel or an adoption of the indorsement on the part of the defendant.

It appeared that S. had forged Omand's indorsement to a number of notes which he had negotiated with the plaintiff. In March, 1903, prior to the making of the above note, the plaintiff had sued Omand and others on a note for $755, the indorsement of Omand's name upon this note having been forged by the same person. Upon being served with the statement of claim in the first suit Omand took it to his solicitor and instructed him to enter a defence denying the indorsement. Omand and his solicitor differ as to what subsequently took place. The solicitor appears to have been under the impression that the matter had been settled. No defence was entered, and judgment was signed against Omand by default. Nothing appears to have been done on the judgment, and Omand was not aware of its existence until a year after its entry. He then applied to open it up, and an order setting it aside was made by Mathers, J. While the judgment was current, the present note was made and negotiated to the plaintiff. The plaintiff contends that Omand, by letting judgment go by default against him, lulled the plaintiff into the belief that the indorsement was genuine, and induced him to take another note similarly indorsed, and that, therefore, Omand should not now be permitted to deny his signature..

In Barber v. Gingell, 3 Esp. 50, it was held by Lord Kenyon that a defendant by paying several previous bills to which his name had been forged as acceptor by the same party had adopted the acceptance and made himself liable on the bill. In Morris v. Bethell, L. R. 5 C. P. 47, the decision in Barber v. Gingell was commented upon and explained. It was pointed out that the principle of Lord Kenyon's decision in that case was, that if it were made to appear that there had been a regular course of mercantile business in which bills have been accepted by a clerk or agent, whose signature has been acted upon as the signature of his principal, there would be evidence, and almost conclusive evidence, against the latter, that the acceptance was

written by his authority; that this is not so much a matter of law as a conclusion of fact. Bovill, C.J., puts the principle shortly as follows: "If the defendant had, by his conduct, led the plaintiff to suppose that the acceptance was his genuine signature, or was authorized by him, he might be estopped from disputing it, otherwise not. But that was especially a question for the jury." All the Judges who took part in Morris v. Bethell were of opinion that the payment of one forged acceptance by the person whose name was forged, was not in itself sufficient to bind him on subsequent forged acceptances, where he has failed to give notice.

In the present case I find that S. had been putting Omand's name, without authority, to notes for some time and negotiating them to the plaintiff, but that Omand was not aware that these forgeries were being committed. When Omand was sued in March, 1905, upon the note for $755, he became aware for the first time that his name had been forged upon a note. The evidence of both himself and his solicitor, although varying considerably in other respects, agrees in stating that he had no intention of letting judgment go against him upon that note. By a misunderstanding no defence was put in by the solicitor, and judgment was entered. The failure to put in the defence was not an act of positive intention upon Omand's part, such as the payment of the note by him would be. It was merely the result of an error. The plaintiff contends that if a defence had been put in and the indorsement disputed, he would not have taken the note now sued on. While it may be inferred that the plaintiff would not, if he were aware of the forgery, discount a note bearing a similar indorsement, it may also be reasonably inferred from the previous conduct of the plaintiff that if the $755 note had not been sued upon, he would have dealt with the present note as one indorsed by James Omand, in the same way as he had dealt with other notes purporting to be similarly indorsed. It was not necessarily the fact of having a judgment in the first suit that induced the plaintiff to accept the note now sued on as genuine, because he had previously taken other notes similarly indorsed without inquiry, and from the fact of the transactions being continued, it may be fairly concluded that he had found them satisfactory. I am, therefore, of opinion that the plaintiff was not led into taking the note sued on by any representation derived from the fact that no defence had been put in

by Omand in his first suit, and that judgment had accordingly been entered against him. No doubt, if a defence had been entered in the first suit, the plaintiff would have been put on his guard. But can Omand's unintentional failure to defend that suit be taken against him as an act of estoppel which will preclude him from denying the signature upon the note now sued on, or as an act of representation which will make him liable to the plaintiff upon the note as if he had actually indorsed it?

The principles of estoppel in pais or equitable estoppel have been defined by Brett, L.J., in Carr v. London and North Western R. W. Co., L. R. 10 C. P. 307, and his statement of these principles is approved in subsequent cases: Coventry v. Great Eastern R. W. Co., 11 Q. B. D. 776; Seton v. Lafone, 19 Q. B. D. 68; Dixon v. Kennaway & Co., [1900] 1 Ch. 833. If any of the propositions stated by that learned Judge as constituting an estoppel, apply to the facts in this case, it would be the following: "If a man, whatever his real meaning may be, so conduct himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he, with such belief, does act in that way to his damage, the first is estopped from denying that the facts were as represented."

The proposition so stated does not appear to me to apply in the present case, because there was no intention on the part of Omand to mislead the plaintiff in any way. Where he was ignorant of the fact that judgment had been entered against him, the existence of the judgment cannot constitute a representation by him calculated to mislead.

Several of the previous notes to which Omand's name had been forged as indorser had gone to protest, and notices of dishonour had been sent to him by mail in the usual way. He states positively that none of these ever reached him. During that time he lived with his father and his niece, who read his letters for him, as he could not himself read writing. There was evidence that sometimes letters intended for him went to S.'s house and to other houses in the neighbourhood. S.'s evidence, given on behalf of the plaintiff, goes to shew that Omand's father connived with and abetted S. in the forgery. If so, it would be to the interest of the father to suppress the notices of dishonour if they came to

his hands. I must find that the evidence fails to establish that the notices were received by, or came to the knowledge of, James Omand.

There should be a verdict for the defendant James Omand, with costs of suit.

NORTH-WEST PROVINCES.

(MACLEOD.)

HARVEY, J. SEPTEMBER 12TH, 1907.

TRIAL.

BEERE v. NORTHERN BANK.

Fraud and Misrepresentation—Transfer of Land as Security for Money Lent—Action to Cancel Registration of Transfer—Alleged Promise not to Register—Failure to Prove Promise.

Action for a declaration that a certificate of title to land was obtained through fraud, and for its cancellation, and for an injunction and damages.

E. P. McNeill, for plaintiff.

McDonald, for defendants the Northern Bank.

J. L. Fawcett, for defendant W. P. Malone.

HARVEY, J.:—On 9th April last the plaintiff, who was under a charge of theft which was to be heard on that day by a justice of the peace, was advised by his advocate, one Macleod, that he should have some money, so that, if he could succeed in getting the charge disposed of by the imposition of a fine, he might be in a position to pay the fine. The plaintiff having no money, Macleod undertook to try to obtain it from the defendant Malone, the then manager at Macleod of the defendant bank, the plaintiff having informed Macleod that he had some property which was incumbered. The matter had to be arranged in haste, as the plaintiff and his advocate required to leave on the early morning train, and the interview which Macleod had with the defendant Malone

was short and took place in Malone's bedroom. At this interview Malone positively refused on behalf of the bank to advance any money to the plaintiff, who was then indebted to the bank in between $200 and $300, and whom Malone characterized to Macleod as dishonest. Macleod told Malone that plaintiff had some property in which there was an equity, and on his undertaking to get a transfer of this property Malone agreed to honour Macleod's drafts on him to the amount of $150. On the same day plaintiff made a transfer from himself to Macleod, and when he delivered it to him asked him not to register it, as he was then negotiating a new loan on the property. On 11th April Macleod went to Malone with this transfer, and another from himself to Malone, and then made a draft on Malone for $100, and delivered to him the two transfers. The draft was accepted by Malone, and subsequently paid by him personally by depositing the amount to the credit of Macleod's account with the bank. During the interview Macleod told Malone that he had promised plaintiff that he would not register the transfer. On the same day, and within a few hours, Malone sent the transfers to the land titles office to be registered, and they were duly registered, and a certificate of title was granted to him, and a few days later he gave notice to the plaintiff to give up possession of the property.

The plaintiff now sues for a declaration that this certificate of title was obtained through fraud, and for its cancellation, and for an injunction restraining the defendants from dealing with the lands or interfering with the plaintiff's quiet enjoyment of them, and for damages.

The defendant bank deny all connection with the transaction, and the defendant Malone alleges that he purchased the property outright on his own behalf for the moneys advanced. The plaintiff swore that in an interview between himself and Malone and Macleod, Macleod said to Malone, "You promised not to register that transfer," and Malone replied "I know I did." This is denied by Malone, who states that he did not promise not to register the transfer. The plaintiff's witness Macleod says that what took place was that he said to Malone, "I told you I promised not to register the transfer," which Malone admitted to be the fact. Malone's evidence on this point is the same as Macleod's. I find the fact to be that Malone did not give any promise not to register the transfer, and I am further satisfied, on

the evidence, that there was no undertaking or condition not to register to be implied from the circumstances. In a portion of Malone's examination for discovery, which was put in evidence, having reference to the interview last mentioned, the following appears:—

Q. What reason did you give for registering?

A. Macleod understood I was going to register.

Q. Is that the reason you gave on that occasion?

A. I had no need to offer any excuse for registering then.

Q. Will you tell me if you did offer any excuse, and if so, what excuse?

A. I don't know; I thought it funny that they should think me fool enough to take a transfer and not register it. I don't think I gave any excuse at all.

It is true that, as appears by the evidence, Beere had given two mortgages and a transfer affecting this same property each as security for an indebtedness, with an agreement that it should not be registered, and he may possibly have considered that he could do the same again. Whatever the special circumstances of these cases were, I think it very doubtful that he could have seriously thought that Malone, who he know would not advance him any money, and whose bank had judgment against him for about $250, would advance anything without having some security other than the mere holding of a transfer. To give the transfer at all, after having dealt with the property as he had, was dishonest, and Malone's characterization of him to Macleod as dishonest shews that he considered that he was not to be trusted, and, whatever view the plaintiff may have had, it is incredible that Macleod, who acted as his agent and was himself a lawyer, could suppose that Malone would advance the money he did advance on the stength of an unregistered transfer from a person over whom he had no control and in whose honesty and faith he had no confidence.

It is to be observed that Macleod did not tell Malone that he must not register the transfer, but simply said that he himself had promised not to register it. I feel no doubt that in doing that he had no thought of binding Malone not to register, and that Malone was strictly right when he said that Macleod understood he was going to register it. Moreover, Malone swears, and it is not denied, that he told Macleod he was going to register, though he is not sure he did it at the time the transfers were given to him. Mac-

leod wanted the money for his costs. He could not get it from the plaintiff, and he must have known that he could get it from Malone if he made it a condition that the transfers were not to be registered. Whether he preserved good faith to his client or not is not material to the issue here. He conducted the negotiations as agent and on behalf of the plaintiff, and when the agreement was first made nothing was said about registration, and when it was mentioned it appears to have been mentioned only in a casual way, and not as of any special importance.

I find, therefore, that there was no breach of faith in the registration of the transfers, and there is, therefore, no ground for the cancellation of the certificate of title.

It is unnecessary to decide whether Malone acted for himself, or on behalf of the bank, though, if necessary, I should hold the former, or whether the transfer was in pursuance of an absolute sale or to secure the advance, for even in the latter case Malone would be entitled to the title and possession of the property until the amount of the advance was repaid. The action will, therefore, be dismissed as against both defendants with costs.

NORTH-WEST PROVINCES.

(REGINA.)

NEWLANDS, J. SEPTEMBER 27TH, 1907.

TRIAL.

HUGGARD v. ONTARIO AND SASKATCHEWAN LAND CORPORATION.

Vendor and Purchaser—Contract for Sale of Land—Lien for Unpaid Purchase Money—Cancellation of Contract—Release of Purchasers—Agreement as to Release—Delivery—Fraud and Misrepresentation.

Action to establish and enforce a lien on land for unpaid purchase money, or, in the alternative, for cancellation of agreement for sale, and for other relief.

J. A. Allan, Regina, and McMorran, Regina, for plaintiff Huggard.

Frame, Regina, and McLaws, Winnipeg, for plaintiff Corelli.

A. E. Hoskin, Winnipeg, for defendant corporation.

W. M. Martin, Regina, for defendants Scott and wife and defendant Hambly.

NEWLANDS, J.:—The plaintiffs and the individual defendants, other than the defendant Aird, purchased certain lands from the Canadian Pacific Railway Company for the sum of $4 per acre, and sold them to the defendants the Ontario and Saskatchewan Land Corporation for $5.25 per acre. A trust agreement was entered into between the plaintiffs, said individual defendants, and the defendant Aird as trustee for them, and Aird as such trustee entered into two agreements with the Ontario and Saskatchewan Land Corporation as to the sale to and payment by the corporation for the lands. Of the purchase price, $4 per acre was to be paid to the Canadian Pacific Railway Company, for which an agreement was entered into with them by the corporation, and the remainder was to be paid Aird as such trustee, to be applied by him for expenses and commission, the balance to be divided between the plaintiffs and individual defendants other than Aird, in the manner provided by the trust agreement.

The plaintiffs in their statement of claim allege that the Ontario and Saskatchewan Land Corporation have not complied with the terms of the agreement of sale between Aird and themselves; that they have neither paid the amount due the Canadian Pacific Railway Company nor the amount due the plaintiffs and individual defendants; and that the Canadian Pacific Railway Company are threatening and intend, unless the arrears due them are promptly paid, to cancel the agreement between themselves and the defendant corporation, and that the interest of the plaintiffs and the individual defendants in said lands would thereby be lost. They also allege that the Ontario and Saskatchewan Land Corporation are insolvent and unable to pay the money due under the agreement.

The plaintiffs claim a lien on the lands sold for the unpaid purchase money, and to have the lands sold for the

purpose of satisfying the lien and paying to the plaintiffs and the individual defendants interested therein the amount of the purchase money due them, or, in the alternative, that the agreements of sale to the Ontario and Saskatchewan Land Corporation be cancelled, and that said corporation should execute a conveyance to them and the individual defendants vesting said lands in them.

Two defences are set up. First, that the plaintiffs and individual defendants executed a release to the Ontario and Saskatchewan Land Corporation of any and all claims that they or any of them might have against the corporation. Second, that the plaintiffs were promoters of the defendant company, and purchased said lands as such promoters, and as such occupied a fiduciary relationship with regard to the defendant corporation, and are therefore precluded from making any profit from their dealings with the corporation.

In reply to the first defence the plaintiffs say that they executed the release for a special purpose only, namely, to facilitate the consummation of an agreement or arrangement which the defendant corporation and the defendant C. D. Scott alleged was then outstanding with a corporation known as the Canadian Savings Loan and Building Association, under which the said association were represented as having agreed to take over the defendant corporation's rights and liabilities under the agreement with the Canadian Pacific Railway Company, and further that the release was executed and delivered on an express verbal agreement between the plaintiffs and defendant corporation that it was to be used for such purpose only, and that in default of immediate consummation of such agreement the release should be cancelled and destroyed; that the agreement was never consummated, and the release became void, and should be delivered up to be cancelled.

They further reply that they were induced to execute the release by the misrepresentation and fraud of the defendant corporation and the defendant C. D. Scott. The fraud alleged was that defendant Scott stated that the Canadian Pacific Railway Company were then taking proceedings against the defendant corporation to forfeit the interest of the corporation in these lands, and that great loss would, as a consequence, fall upon the defendant corporation and their shareholders; that the defendant corporation had made the agreement with the Canadian Savings Loan and Build-

ing Association I have referred to, which association would take over the lands, and pay the Canadian Pacific Railway Company, if they would execute the release.

At the trial it was proved that the plaintiffs and individual defendants were a syndicate that purchased these lands from the Canadian Pacific Railway Company, and that the defendant corporation were organized by the defendant Scott principally for the purpose of purchasing these lands from the syndicate; that, at the time the first payment became due, no stock of the corporation had been sold; and that the money for the deposit when these lands were purchased was advanced by plaintiff Corelli, and the money for the first payment was borrowed from the Eastern and Western Land Company, and, after sufficient stock in defendant corporation had been sold to repay these amounts, they were repaid, and the land transferred to defendant corporation, and in payment for the loan by the Eastern and Western Land Company 50 cents per acre in stock of the Ontario and Saskatchewan Land Corporation was given to them. The promoters of the corporation failed to sell sufficient stock to make the payments for the land, and they were in danger of losing the land, in which event the shareholders who put money into it would lose all they had put in. The directors had also been trying to sell the land in several directions, but had failed. According to Mr. C. D. Scott's evidence, the directors, through him, had requested Sir Daniel McMillan to see the president of the Canadian Pacific Railway Company to see if he would grant an extension of time, but the president refused. Mr. Scott and some of the directors then went to Montreal and saw the president of the Canadian Pacific Railway Company. As to this interview Mr. Scott says "that it was made plain to them that the Canadian Pacific Railway Company would not alter their contract at the request of individuals. I represented to Sir Thomas that this was a matter in which a large number of shareholders were interested, who would lose all the money they had invested if the lands were forfeited, and I believed I could secure a release of the individual interest, that is, the syndicate interest, and that the money would go to the shareholders. On that representation Sir Thomas agreed to extend the time and spread the payments over a period of 10 years and give us till 1st June following to make the first payment." After that Mr. Scott drew up the release.

had it signed by the members of the syndicate in the east, and then went to Winnipeg and had it signed by Mr. Bull, Sir Daniel McMillan, and the plaintiffs. There is a conflict of testimony as to what took place on this occasion. On this point Mr. Corelli says: "My recollection of the conversation was that Mr. Scott told me that the Canadian Pacific Railway Company were going to cancel the contracts for the Ontario and Saskatchewan, and that if they did so the shareholders of the company would lose their money, and of course naturally we would get nothing. He said, 'if you will release your interest, then the Canadian Savings of Toronto will take over the holdings of the Ontario and Saskatchewan and give to the shareholders of the company dollar for dollar of the stock of the Canadian Savings.' Mr. Scott explained to me that the C. P. R. were going to cancel, and that the Canadian Savings were going to take over the holdings of the company. He also stated that these two agreements were to go before the shareholders of both companies and if they did not go through them the document would be destroyed, that is the way it was to be."

The plaintiff Huggard in his evidence said:—

"Q. Go back to the office. What took place in the office? Was anything said in there by Mr. Scott in regard to the extension of the C. P. R.—the C. P. R. granting extension to the Ontario and Saskatchewan; did he tell you at that meeting there was an extension granted?

"A. Oh no, nothing said about that. On the contrary, what bothered me was his statement of the impending forfeiture by the C. P. R. relating to the matter. He told me he had come upon a telegram from Mr. Griffin, and the thing was in a very bad shape, and unless something was done at once the shareholders would lose, and, besides, the Eastern and Western would lose the money due to it. . . I glanced over the release, which seemed to use general terms in certain ways, and my eye caught the clause relating to the Trust and Guarantee Company. I asked Mr. Scott for an explanation, and the explanation was that the Trust and Guarantee Company were to have an assignment from Aird, pursuant to the terms of the release, and they were to close the arrangements for the exchange of stock between the Eastern and Western and the Canadian Savings, and that the release was for the purpose of enabling the Canadian Savings

in this way to get the property and exchange only for stock that would be due to the Ontario and Saskatchewan. We went into the question of details, how it was working out. Each shareholder of the Ontario and Saskatchewan was to get one share of fully paid up stock in the Canadian Savings, and the Eastern and Western was to be paid by the Canadian Savings the money through the Ontario and Saskatchewan—the money that the Ontario and Saskatchewan had got indebted to them on the taking over of the option. . . . . Mr. Scott didn't seem to think there was any doubt about the deal going through, but of course if there was any hitch the whole thing would drop.

"Q. What did he say about that?

"A. The release was part of that transaction for the purpose of enabling this matter to go through.

"Q. If the thing failed, what became of the release?

"A. It was to be destroyed.

"Q. Was it stated so?

"A. Yes, absolutely so. If the Canadian Savings did not put up the money to protect from the C. P. R. the thing would not go through,—the original plan was not being carried out."

Mr. Scott, in his evidence for the defendants, denies that he ever told either of the plaintiffs that the C. P. R. was going to cancel the contract with the Ontario and Saskatchewan Corporation, or that the release would be destroyed if the sale to the Canadian Savings Company did not go through. On his cross-examination he says he may have told them that the shareholders might lose their money because we were in danger of having the contract cancelled by the C. P. R. He also says he told them that he was endeavouring to sell these lands to the Canadian Savings Company, and that other members of the syndicate were also endeavouring to sell them, and he thought the deal could be put through; and of the conversation he had with the president of the C. P. R.

Sir Daniel McMillan in his evidence states that he believes there was some conversation as to the Canadian Savings Company, that a sale might be made to them, but he didn't state positively that it would be, and he further says that it certainly was not his understanding that the release was for the purpose of enabling the sale to the Canadian Savings

Company to be carried through, and if that sale did not go through the release was to be cancelled.

Sir Daniel also refused to sign the release until he had taken advice of counsel that the release was an absolute one. On being informed by his counsel that the release was an absolute one, he signed it, after which Mr. Huggard, on getting the same information, also signed it. Mr. Scott is therefore corroborated in his evidence by Sir Daniel McMillan and the release itself. Both the plaintiffs are intelligent men, and must be presumed to know what they were signing, and Mr. Huggard, from his own evidence, certainly did. Besides, I can see no reason why Mr. Scott should have misrepresented the facts to them. The true facts were certainly sufficient reason why the release should be given. The land could not be sold at a price that would pay the Canadian Pacific Railway Company and the members of the syndicate; the Ontario and Saskatchewan were in default; the president of the Canadian Pacific had refused to extend the time for payment unless the individual members of the syndicate released their interest, and the contracts were therefore liable to be cancelled, in which event the shareholders of the Ontario and Saskatchewan would lose the money they had paid, and the members of the syndicate would get nothing. These are the reasons Mr. Scott says he gave, and he is, in my opinion, borne out by the evidence, and I think that the plaintiffs are mistaken in the version they have given of the conversation they had with him. . . . For these reasons I hold that the plaintiffs have not proved any misrepresentation or fraud on the part of the defendant corporation or the defendant Scott by which they were induced to sign the release set up, nor that the release was to be cancelled if the arrangement then pending with the Canada Savings Association did not go through.

The plaintiffs also assert that they asked to have their names taken off the release before it was completed by delivery, and that therefore they are not bound by it. The plaintiff Corelli wrote to the defendant C. D. Scott on 24th February, 1905: "I feel so strongly in the matter, in view of recent developments, that I would ask you to strike my name off the agreement, as I am positive that this land can be sold within the next few weeks, so that I leave you the option of either securing from the Canadian Savings the right to sell these lands within a reasonable time to be

named by them, say May 15th, or cancel the agreement signed when you were last here." To this Mr. Scott replied on 28th February: "It is not in my power to cancel the release or strike the name of any party out of it. I made my report to the board of directors upon my return from Winnipeg, and the fact that the release has been executed, and the matter then passed from my control." Mr. Corelli replied to this on 8th March: "I cannot see why my request to have my name taken off the agreement cannot be acted upon. I could understand you taking this ground had I waited until the meeting had taken place, but, seeing that my letter had arrived prior to that meeting, I must really request you to act upon it, and I am asking this on my own behalf and in the interest of all concerned, shareholders included."

Mr. Huggard wrote on 4th April, 1905, to Mr. Scott: "I wish you would absolutely strike my name out of the agreement relating to the Ontario and Saskatchewan until my Eastern and Western claim is paid." This was, however, after all the parties had signed the release, and it had been communicated to the corporation.

The release is under seal, and is signed by each of the plaintiffs. The only question to be considered is whether it was completed by delivery, because, if it was so completed, the plaintiffs could not strike their names out of it. The release itself states that it was "signed, sealed, and delivered." After it was signed by the plaintiffs it was left by them with the defendant Scott, who, as well as being one of the releasors, was the secretary of the Ontario and Saskatchewan corporation. The plaintiffs, therefore, not only parted with the possession of the release, but also with all control over it, and, as it would be presumed that the Ontario and Saskatchewan Corporation would accept it, it being for their benefit, it is, I think, properly delivered and took effect immediately, and the plaintiffs could not therefore strike out their names from it. In Doe dem. Garrons v. Knight, 5 B. & C. 671, Bagley, J., said at p. 692: "Upon these authorities, it seems to me that where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, nothing to shew he did not intend it to operate immediately, it is a valid and effectual deed, and that delivery to the party who is to take by it, or to any person

for his use, is not essential. I do not rely on Doe v. Roberts, because there the brother who executed the deed, though he retained the title deeds, parted with the deeds which he executed. But if this point were doubtful, can there be any question but that delivery to a third person, for the use of the party in whose favour a deed is made, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery? The law will presume, if nothing appear to the contrary, that a man will accept what is for his benefit." This case was approved of in the House of Lords in Xenos v. Wickham, L. R. 2 H. L. 309, and was followed by Evans v. Grey, 9 Ir. L. R. 593.

There is also proof that the corporation actually accepted and acted upon this release, and afterwards sold the lands to one Grant Robertson, and also that the Eastern and Western company released their interest of 50 cents per acre to the Ontario and Saskatchewan corporation. Under all these circumstances, I think the release became effective immediately it was given to Mr. Scott, and that thereupon all the interest of the plaintiffs in these lands was distinguished.

Under these circumstances, it is entirely unnecessary for me to consider the other question raised as to whether the plaintiffs were promoters of the Ontario and Saskatchewan corporation, so I do not give any decision on that question.

There will be judgment for defendants with costs.

YUKON TERRITORY.

OCTOBER 1ST, 1907.

COURT EN BANC.

McDONALD v. WINAUD.

Contract—Sale of Mining Claim—Promise to Pay Fixed Sum Provided it be Taken out of Claim—Issue as to whether Working Expenses to be Deducted—Equitable Lien for Unpaid Purchase Money—Effect of Resale of Claim before Time for Payment.

Appeal by defendants from judgment of CRAIG, J., ante 151, in favour of the plaintiff in an action to recover from

the defendants $700 upon an undertaking or agreement dated 20th December, 1905, and also to recover the sum of $600 on a similar agreement, with the exception of the words "above working expenses," dated 27th December, 1905.

The appeal was heard by DUGAS and MACAULAY, JJ.

F. T. Congdon, K.C., and George Black, for defendants.

H. S. Tobin, for plaintiff.

MACAULAY, J.:—The facts of the case are set out in the judgment of the learned trial Judge, and also the agreements, which are in the words following:—

$700.00. Dawson, Y.T., 20th December, 1905.

Know all men by these presents that I, Herbert Winaud, of Dawson, Y.T., do promise to pay John E. McDonald on or before October 1st, 1906, at the Canadian Bank of Commerce, Dawson, Y.T., the sum of seven hundred dollars, provided this sum be taken out in gold and gold dust from creek placer mining claim number 13 below discovery on Hunker Creek, Yukon District.

Herbert Winaud.

The second agreement, dated 27th December, is in the same words, but, in addition, after the words "taken out in gold and gold dust," the words "above actual working expenses" are added.

It was contended by the appellants that by mutual mistake the words "above actual working expenses" were omitted from the agreement of 20th December, 1905. The trial Judge, owing to the view he took of the case, did not consider it necessary to decide whether or not the above words were omitted by mutual mistake of the parties, and, owing to the view I take of the case, I do not think it would be necessary for me to come to a decision on that point either, but however, if I were called upon to decide the point, I think, on all the evidence before me, I could come to no other conclusion but that the words "above actual working expenses" were omitted from the first undertaking or agreement by mutual mistake of the parties.

It is unnecessary, however, for me to further discuss that question to shew how I would arrive at that conclusion,

because I agree with the trial Judge that the case should be decided on other grounds.

The evidence shews that on 20th December, 1905, the defendant Winaud, on behalf of himself and his co-defendants, purchased from the plaintiff John E. McDonald a one-half interest in creek placer mining claim number 13 and fractional claim number 13 A below discovery on Hunker Creek, for the sum of $1,200; $500 was paid in cash, and the balance was to be paid according to the agreement entered into between the parties and signed by Winaud.

On 27th December, 1905, the defendants purchased from the plaintiff the remaining undivided one-half interest in the claims for the price or sum of $1,200; $600 being paid in cash, and the agreement dated 27th December, 1905, being taken for the remaining $600. This half interest was owned by one John C. McKenzie, a partner of the plaintiff, but, as he was indebted to the plaintiff, the agreement to pay was made out in favour of the plaintiff.

The evidence shews that the defendants proceeded to work upon the said claims, and continued their work from time to time up to 25th June, 1906, but did no work thereafter. The total amount of gold taken from the claim appears to be $1,279.50. They allowed themselves wages at the rate of $6.50 per day, amounting to $3,406, and the other expenses of working the claim brought the total cost up to $4,028.55.

On 5th May, 1905, the defendants gave an option upon the said claims to one R. Moncrief and one M. H. Jones for $2,000; $1,000 to be paid on 1st June, 1906, and $1,000 on 1st August, 1906, which option was taken up in due course by Moncrief and Jones, and a bill of sale was duly executed to the said Moncrief and Jones of the said property in accordance with the terms of the said option. There was a proviso in the option that during the summer season of 1906 the vendors, the defendants in this action, were to have the right to enter upon and work the same, together with 4 extra men, making 8 in all, but no more; that is, to work the said claims 13 and fraction 13 A. No work, however, was done by the said defendants other than above described, and no work was done by them after the 25th June, 1906.

In answer to the plaintiff's demand for payment of the balance due him under his agreement, the defendants say that they worked upon the said claims at a great loss up to

25th June, 1906, and exhausted all reasonable efforts to obtain gold from the ground, and were thoroughly satisfied that if they continued working for a longer period they would be working at a greater loss, and that, as the total amount of gold produced, and the $2,000 (the purchase moneys received for the claims) were not sufficient to pay the actual working expenses of the claims, they are not indebted to the plaintiff in any amount whatever, their contention being that under the agreements above mentioned they were only to be liable to the plaintiff for the sums mentioned in said agreements, provided the sums were taken out in gold or gold dust from the claims.

The trial Judge was of the opinion that the defendants having parted with their property before the expiry day of payment mentioned in the agreements, voluntarily put it out of their power to realize the moneys out of the claims that might have been realized had they continued to work them during the summer season of 1906, and cites many authorities in favour of that proposition. . . .

In Sanders v. Baby, 5 C. P. 441, the defendant agreed to sell to the plaintiff the net profits for 2 years from the date of the agreement out of certain shares in the Lake Huron and St. Mary's River Mining Company, and before the expiry of the date the defendant sold out his stock and made it impossible, therefore, to carry out the agreement.

In Wolf v. Marsh, 3 Morrison's Mining Reports 204, the agreement was in the following words: "For value received I promise to pay S. Wolf or order $449 with interest at one per cent. per month from date until paid. Principal and interest payable in United States gold coin. This note is made with the express understanding that if the coal mines on the Marsh ranch yield no profits to me, then this note is not to be paid, and the obligation herein expressed shall be null and void." Marsh sold the lands, and made it impossible to carry out the agreement, and therefore judgment was given against him.

Both those cases are different to the one before me, in my opinion, because in Sanders v. Baby it was expressly understood that in any event it was only the profits from the two years, whatever they might be, that the plaintiff was to receive; and in Wolf v. Marsh it was expressly understood that if the coal mines in the Marsh ranch yielded no profits, then the agreement to pay should be null and void.

There are no such terms as these mentioned in the agreements before us, and I do not think we should be justified in placing the narrow interpretation upon them, that, if the gold dust in the one instance was not taken from the claim before 1st October, 1906, and in the other case before 1st July, 1906, the debt in each case would be extinguished; and I should be inclined to place the more liberal construction upon them, if necessary, and hold that the debt would still remain.

One of the purchasers of the claims, Jones, was placed in the box, and he stated that he and Moncrief were well pleased with their bargain; that they were now holding their claims at an upset price of $5,000. There is evidence to shew that the defendants pointed out a pay streak to Moncrief and Jones on the property, but stated that it was too wet for them to work, which leaves us to believe that in any event the gold in the claim had not been exhausted, and it is difficult to say what amount of gold might yet be taken from the claims.

For all the above reasons, I am of the opinion that the judgment of the trial Judge should be affirmed, and that the appeal should be dismissed with costs.

DUGAS, J.:—Mr. Justice Macaulay having prepared a written judgment which has the effect of confirming the judgment given by Mr. Justice Craig in the Court below, and consequently of dismissing the appeal with costs, it would be idle for me to enter into any discussion. I would like to say, however, that I would not be prepared to admit that the purchase money would be due in any event whether the claim had or had not yielded sufficiently. I would add also that I would very hesitatingly accept the argument that the defendants were entitled to pay to themselves wages whilst working on the claim under such circumstances, even when accepting that the contract was as they allege it. It seems to me contrary to all sense of justice that they could take advantage of the sale of such a property with such conditions and make a good living out of it, and keep the vendor in the meantime in abeyance and deprived of all profit from his sale. I only mention this so as not to be bound by the views expressed on the subject.

I am with Mr. Justice Macauley on the other questions, and more particularly I believe that the defendants have

put themselves out of Court by not exhausting, themselves, the claim, and by selling it in the way that they have done. I therefore concur in dismissing the appeal with costs.

YUKON TERRITORY.

OCTOBER 1ST, 1907.

COURT EN BANC.

HOCKING v. WENZELL.

Mines and Minerals—Placer Mining Claim—Representation Work—Sufficiency—Placer Mining Act—Expiry of Claim—Staking by Re-locator—Onus of Proof—Requirements of Statute—Affidavit and Application—Improper Admission of Evidence—Non-performance of Work by Men Employed on other Claims—False Affidavits—Status of Re-locator—Possession of Original Grantee—Bona Fide Attempt to Comply with Requirements of Statute.

Appeal by defendant against the judgment of the Gold Commissioner setting aside a grant of placer claim 59 A below discovery on Sulphur Creek, on the ground that not sufficient work had been done to represent the said claim under sec. 41, sub-sec. 2, of the Placer Mining Act.

The appeal was heard by DUGAS, CRAIG, and MACAULAY, JJ.

F. J. McDougal, for defendant.

F. J. Stacpoole, for plaintiff.

CRAIG, J.:—The appellant raises many points in his appeal, with some of which it will not be necessary for me to deal as I view this case. The appellant insists, first, that sufficient work was done to represent the claim, and that the Gold Commissioner erred in finding the contrary. Objection is also taken to the jurisdiction, but this matter is healed by the consent of the Commissioner to the litigation under the provision in the Act regarding adverse right, sec. 44.

Dealing, first, with the facts in this case, Hocking is the first witness called, and it seems he is only a blind for the real plaintiff, and staked under a contract to transfer. He learnt that the claim would expire on 23rd November, 1906, and at midnight, one minute after midnight, by a half moon light with snow on the ground, he stakes; he says his stakes were about 4 feet high, tied with string to old stakes; he is not sure where the base line was, but thinks it may have been 50 feet away. He speaks in a very careless and indifferent manner about it, saying that "the base line was quite a bit away." He went back on 30th November and measured the work of the owner of the claim by dropping a tape-line, with a weight tied to it, in the presence of Lineham and Sutherland; again he went to the claim on 14th December with Shop and Jensen, with the same tape-line, and Jensen went down the hole; he found no drifting. Hocking is a constable in the North-West Mounted Police and a helper of Smith, who acts as mining recorder, and the information of the lapsing of the claim seems to have been conveyed by another mounted policeman. He says his stake was in size 2 by 4. Shoop is called; he measured the hole as 29 feet, 6 inches. Jensen also measured it at 29 feet, 6 inches. If these witnesses are correct, then the hole was not of sufficient depth to answer the requirements of the Act for representation under any schedule which was in force. For the defence Patton is called, who says he is entitled to the claim as having an option for purchase on it, and that he emplayed one Ballentine to perform the representation work according to the schedule and before the expiry of the claim. The same men were employed on several other claims for him. Moore, a witness, says he took the job from Ballentine to represent this particular property, and he sank a hole a depth of 36 feet, 6 inches, and measured it by dropping a rope into the hole and measured the rope afterwards with a foot rule; he was assisted in the work by one Ivey, Ivey is also called; he says the hole measured 33 feet, 8 inches, or a foot more if certain allowances were made for a depression in the ground caused by sinking and thawing. Brown measured 34 feet in the same way as Moore, by dropping a rope and measuring the rope afterwards with a foot-rule. Ballentine measured it 34 feet with the same rope. A great deal of evidence was given as to the possibility of doing the work in the time. We have 3 witnesses swearing that the

hole was not of sufficient depth, and 4 swearing that it was. The Gold Commissioner finds as a fact that the work was not done. It appears by admission and by the judgments that the Gold Commissioner delayed the giving of his judgment until he heard the evidence in other two cases, and in the judgment in this case he refers to his judgment in the other cases, which were tried together, and says: "For the same reason that I have given in the case of Palmgreen v. Tabor, I am of opinion that the plaintiff had the right to stake the claim in question when he did, and that he had a right to bring this action." In this case the Gold Commissioner gives no reason why he believes one set of witnesses rather than another. As I view these cases, the onus of establishing absolutely to the satisfaction of the Court the right of re-location rests upon the re-locator. The owner in possession, and entitled to a renewal on the performance of work, is entitled undoubtedly to the first consideration of the Court, provided always that he honestly endeavours to fulfil the requirements of the Act entitling him to renewal, and, before he can be dispossessed or denied the right of renewal, it must be satisfactorily shewn, beyond any doubt, that he has failed in the requirements of the Act. I should hesitate very long to decide that the Gold Commissioner was wrong upon the facts in this case. He saw the witnesses and he had a right to believe the 3 rather than the 4, because undoubtedly, even on the evidence, as properly admitted, there is grave suspicion resting upon the owner of the claim or upon the men employed to do the representation work. The hurried manner in which the work was done, the delay in commencing it, and very many other things which appear, indicate that at least, speaking very mildly, they are open to suspicion. On the other hand, the re-locator, or as he is sometimes called, the jumper, when he endeavours to deprive another man of his property, must come into Court with clean hands, and, besides, he must satisfy absolutely the requirements of the statute, in his own regard and as it affects his own acts entitling him to a grant. In this case he failed in two requirements of the statute; he did not fix stakes in the ground, but he tied his stakes on to an old stake. A legal post is defined by the Act to be "a stake standing not less than 4 feet above the ground and flattened on two sides for at least 1 foot from the top, each of the sides so flattened measuring at least 4 inches across the face." Staking is done

by fixing in the ground firmly at each end of the claim on the base line such legal posts, and writing thereon a legible notice giving the name and number of the claim, or both if possible, its length, and the full Christian and surname of the locator, and these posts must be put on the base line. Now, none of these requirements were complied with by the staker in this case. He did not fix his posts in the ground; he did not fix them on the base line, but at a very considerable distance from the base line. He did not write his full Christian and surname; he wrote it by initials only. I have already held in the case of McDougall v. Rose, ante, that a jumper, as he is called, or a re-locator, must comply exactly with these requirements when seeking to appropriate the property of another man owing to the other man's default in performing statutory conditions. If he seeks to obtain the property because the owner has not exactly complied with the requirements—being short perhaps a foot or two in the measurement of his development work—then surely an equally stringent rule should be applied to the staker who attempts to deprive the man of his property by requiring him to perform all the requirements of the Act in the same strict manner. There is a clause in the Act, namely, sub-sec. 5 of sec. 25, which provides that, "notwithstanding anything herein contained, failure on the part of a locator of a claim to comply with any of the foregoing provisions of this section shall not be deemed to invalidate his location, if upon the facts it appears to the satisfaction of the mining recorder that there has been on the part of the locator a bona fide attempt to comply with the provisions of this Act, and that the non-performance of the formalities hereinafter referred to is not of a character calculated to mislead other persons desiring to locate claims in the vicinity." I have already held in a former case that this means that the staker upon coming in to the recorder to apply for his grant must set out to the recorder then and there truly in his affidavit or application all the difficulties which he encountered in staking, and shew to the recorder why he could not comply with the requirements of the Act, and, if he satisfies the recorder that he made a bona fide attempt to comply with these requirements, then the recorder may allow him his grant, but he must truthfully set out the facts and shew the impossibility of complying with the Act, and that is a condition precedent to his obtaining a grant from the recorder. He must prove

to the recorder the bona fide attempt to comply with the Act, and the recorder must allow the grant. It must be truthful and reasonable.

Now, in the case that I am considering, there was no reason why the man should not have complied exactly with all the requirements of the statute; the base line was run; he could have put his posts there; he did not; he could have fixed his posts in the ground; he did not, but tied them with a string to another one, which is not fulfilling the requirements of the Act; and I have very much doubt, although I won't decide finally upon that point now, whether a staker can use old stakes as his own and blaze them off. He must make the blazing at the top of the stake, where it can be plainly seen, and there write his name, not at the foot of the stake. Viewing the facts as I do, it will not be necessary for me to consider the question of whether the claim was open for the 14 days after the expiry of it, and what the status of the claim was during those 14 days, nor will it be necessary for me to consider which schedule was in force at the time this work was done. I may say I am inclined to the opinion that the schedule used by the office, recognized by them and treated by them as the existing one, and so given to the world, should be the one to be applied, and it would be an undoubted hardship if miners were called upon to act under a schedule which might technically be the one in force, but which really was not, de facto, the one adopted by the department, and given to the world as the one to be used in these matters.

Upon the various other questions which were raised upon the argument as to the status of a staker after a grant has been given or during an existing grant or during the 14 days, my views have been frequently stated before, under the old state of the law and the former Ordinances and regulations, and I am still of the same opinion and think that the new Placer Mining Act only strengthens my views and the law upon those points, as I have already expressed it.

My first impression in this case and in the other was that there should be a new trial, owing to improper admission of evidence, and, as I have already said, I would have hesitated very long to reverse the Gold Commissioner on the facts if he had not, in my opinion, improperly admitted evidence. The improper evidence admitted was of the non-performance of work by the men employed to do the work upon other

claims, really attacking the men for false affidavits on other properties, which was entirely inadmissible, a great part of the case being made up of just such evidence. The only way in which that evidence could have been used was in cross-examination of the witnesses, to shew that it was impossible for them to have done the quantity of work they claimed to do in the time, but they should not have been attacked by evidence shewing that they did not on a certain other claim perform the full amount of work. That was not the issue being tried, and it was impossible for the appellant to expect that any such issue would be raised or any such evidence given, and therefore he was not prepared to answer it. That is the reasonable reply to any such evidence being admitted. It was wholly a surprise to the parties, and, even if it were not a surprise, it was inadmissible evidence. That such evidence weighed upon the Gold Commissioner's mind is undoubted, because he refers to it in his judgment, and gives force and effect to it as affecting his mind as to the credibility of the parties and their truthfulness, which I think he was not entitled to do.

For these reasons I think his judgment should be reversed upon the facts and the appeal allowed with costs.

DUGAS, J.:—I believe that this appeal should be allowed with costs.

If I were to base my judgment upon the evidence as to the representation work required by sec. 41 of the Placer Mining Act, ch. 64, R. S. C. 1906, I would hesitate to dispossess a mine owner who has a grant or who has a right absolute to a renewal, upon any contradictory evidence which leaves a doubt as to whether the full requirements of the law in that behalf have been fulfilled or not. But, as I view the case, I do not feel bound to give any opinion as to the facts of the case upon this subject, no more than upon the very strong point which has been raised by the appellant, that, at all events, the ground in question in this case could not be considered as vacant ground at the time that it was located by the respondent, as, by law, the appellant had 14 days to file his affidavits of representation, and that during that time, whether the representation work had been done or not, he was still in possession, and it could not be held that the same had reverted to the Crown.

Reading secs. 41 to 44 of the Act, inclusively, it seems to me clear that the respondent has otherwise no standing whatever under the law.

By sec. 41, a person, having located a claim can obtain a grant for 1 or 5 years. Such person, after having received such a grant, has a right absolute to renewals fom year to year thereafter on fulfilling the following conditions:—

1. By paying the renewal fees fixed by law.

2. By doing or causing to be done during each year work on the claim to the value of $200, in accordance with the schedule prepared by the Gold Commissioner.

3. By filing, within 14 days after the date of the expiration of the year for which the grant or renewal grant has been made, with the mining recorder or his agent, an affidavit made by him or his agent stating that such work has been done.

By sec. 42 it is declared that, in the event of the work referred to not being done, the title of the owner to the claim shall be absolutely forfeited, and the claim shall forthwith be open for relocation.

Section 43 provides a remedy for the owner who has done his work but has failed to renew his grant.

And sec. 44 provides that "no title shall be contested by any one who does not claim an adverse right, except by leave of the Commissioner. In the event of a claim reverting to the Crown as a consequence of litigation undertaken pursuant to such leave, the plaintiff shall have the first right to locate said claim."

This last section settles, according to my interpretation of the law, the procedure to be adopted by any third party where it is pretended that the required work has not been done.

It cannot be contended that the locating of a claim which is held under a grant, and which is in the possession of the grantee, creates any equity in favour of the locator, so as to permit him to assert that he has an adverse right against the grantee.

Lindley on Mines, at par. 702, gives the distinction which exists between an adverse claim and what he terms a protest, and he gives instances of what is an adverse claim which can be brought in the ordinary way before the Courts, which exist to assert rights or redress wrongs. "An adverse claim," he says, "is based upon the assertion of an adverse right

to the tract applied for, or some part of it. A protest is not necessarily based upon an asserted right. Often a protestant is a mere volunteer, amicus curiæ, who calls the attention of the department to an alleged non-compliance with the law on the part of the applicant, which otherwise might be overlooked," etc.

It is true that in discussing this point reference is made more particularly to quartz claims, and that the different instances which he cites as tending to establish what is and what is not the subject of an adverse claim, refer to the law regulating quartz claims, but the principle can easily be applied to placer claims. I refer to that book, from par. 712 to 742, inclusively.

Even if sec. 42 was not followed by sec. 44, I would still hold, under the case of Morgan v. Osborne and the different judgments which have been rendered under it and so often cited in this Court, that default under clause 2 of sec. 41 does not ipso facto involve such a forfeiture as to render the ground absolutely vacant and vested in the Crown, so as to give to a third party a right to locate and dispossess the grantee who has a title or whose right to renew is made absolute by law, unless the Crown had intervened and had taken advantage of its right to forfeit and thereby take back the property so as to make it ground vacant and open to relocation by any other third party.

Under sec. 44 it is evident that now the title of a grantee in default can be cancelled at the instance of any third party, but it is also evident that no procedure can be taken to that effect unless with the consent of the Commissioner, and that no claim which is in the possession of any person under a grant or who has a right to renew can be located except when it has been declared forfeited.

There is something repugnant to the general principles of the English law in the contention that a citizen who is in possession, and a fortiori under a title, can be interfered with by any party who may choose to pretend that he has not fulfilled his obligations, imposed upon him by the grantor. All the cases on the question shew how strictly the law has always been interpreted in favour of the possessor under such circumstances, and to my mind it would take very clear statutory enactments to set aside this principle.

If, however, under the old regulations, some doubt might have existed on this point, to which I do not agree, sec. 44 now very clearly provides that third parties cannot, at will, enter upon a claim so possessed by another under a grant. The mine owner now is protected by this special enactment, which, at the same time, provides for the means of bringing the defaulter to justice, of forfeiting his claim, and of giving a preference against any other citizens to the one who will bring the matter before the authorities, in permitting him to locate the same ground if he so chooses. He must, before locating, make his claim good by having the forfeiture pronounced, and this only by leave of the Commissioner previously obtained.

This is a wise provision of the law, inasmuch as it permits the Commissioner to protect a bona fide owner from being molested by blackmailers, or by persons who, having nothing to lose, may have hopes of success in the uncertainty of litigation. It maintains the respect which is due to possession, and protects against any high handed interference by requiring a proper inquiry before the possessor is so interfered with. This is, further, within the spirit of the whole Mining Act, which permits location only on vacant ground, which, once located, can be considered so only when it has reverted again to the Crown. Finally, it avoids any danger of a breach of the peace, which is apt to occur every time a third party attempts to interfere with any one's possession of property. I repeat that I do not think that the opinion could be sustained that a locator, under such circumstances, can put forward the contention that he has an adverse claim. Under our mining laws it is easy to conceive of cases where an adverse claim would exist: encroachments, water privileges, rights of way, surface rights as against mining rights, boundary disputes, etc., may create such a situation as to give a right to go before the Courts without leave of the Commissioner.

I may add that, even when no title exists, nor any previous possession, locators of the same ground may have against each other adverse claims which the Courts would have jurisdiction to determine. An adverse claim cannot ordinarily exist except by an adverse possession, which, according to a definition which I find at p. 789 of the Am. & Eng. Encyc. of Law, vol. 1, is "an actual, visible, and exclusive appropriation of land, commenced and continued

under a claim of right, with the intent to assert such claim against the true owner, and accompanied by such an invasion of the rights of the opposite party as to give him a cause of action; and, in order to constitute an effective adverse possession, there must be an ouster of the real owner, followed by an actual, notorious, and continuous possession by the adverse claimant, with an intention on his part to claim in hostility to the title of the real owner." And at p. 795: "There are 5 essential elements necessary to constitute an effective adverse possession: first, the possession must be hostile and under a claim of right; second, it must be actual; third, it must be open and notorious; fourth, it must be exclusive; and fifth, it must be continuous. If any of these constituents are wanting, the possession will not effect a bar of the legal title." And, under the same title, much is cited to shew under what circumstances a claim adverse can be created, and in no way can I see that parties in the condition of the respondent can be considered as adverse claimants under sec. 44, admitting this to be a true definition of what is an adverse claim, as I believe it is.

I cannot qualify the respondent otherwise than as being such a volunteer or protestant who had the right to call the attention of the authorities to the alleged non-compliance with the law, which otherwise might be overlooked, etc., which, under this statutory enactment, only entitles him to a certain remuneration, that is, the first right to locate the said claim. Our law refers not to an applicant but to a grantee, whose title might be cancelled, or who had a right absolute to renew, and I maintain that it is only under such proceedings as directed by sec. 44 that forfeiture can take place at the instance of a third party.

If it were necessary to refer to further authorities, I would point out the case of Farmer v. Livingston, 8 S. C. R. 140, where it was held that "the plaintiff had no locus standi to attack the validity of the patent issued by the Crown to the defendant (under the Dominion Lands Act), as he had not alleged a sufficient interest or right to the lands therein mentioned; there being no allegation that an entry of a homestead right in the lands in question had been made, and that plaintiff had been authorized to take possession of the land by the agent or by some one having authority to do so on behalf of the Crown," etc., and, per Strong, J., it was further held that "when the Crown has issued the letters

patent, in view of the facts, the grant is conclusive, and a party cannot, as it said, set up equities behind the patent." The same, it seems to me, can be said here as to grants of claims. At p. 153 Mr. Justice Strong is made to say that "the 69th section of the Dominion Lands Act, 35 Vict. ch. 23, provides a new remedy for the subject prejudiced by a grant from the Crown issued through fraud, error, or improvidence. It is under this clause in the statute that the bill in the present case has been filed. It will be observed that this section says nothing as to the title required to authorize a party to institute an action under its provisions. It must, however, be assumed, that no one but a person having a title, or being interested in the subject of the grant, is entitled to attack the patent, as it never could have been intended to enable a stranger to take such a proceeding. The statute merely gives a new remedy for the old common law right, and a third person proceeding under it to set aside a patent must, therefore, shew precisely the same title as was required to maintain a scire facias in the name of the subject; namely, that he had rights in the subject of the grant which have been prejudiced and affected by the patent."

It is in accordance with those principles that under the old regulations, which had no proviso such as the one contained in sec. 44 of the Mining Act, that I have always held the view that a grant thereunder could not be attacked by a third party for non-compliance; for, otherwise, it would have had to be said that the non-compliance did not only create the right to forfeit, but had the effect also to bring the title, good until then, to a perfect annihilation, which view I could not accept.

Under sec. 142 of the Dominion Lands Act, there is a proviso for forfeiture of a homestead under certain circumstances, but, under the Act, it is left in express terms to the Minister to decide whether the forfeiture will take place or not.

Under our Mining Act, I take it that the same right exists in case of fraud, misrepresentation, or non-compliance, but that it is vested in the mining recorder to the extent of the proviso contained in sec. 88, with the addition that a third party may have that forfeiture declared by the proper authorities if the Commissioner gives him leave to do so under sec. 44.

Without, therefore, going further into any other questions in the case, I am of the opinion that the respondent had no right to locate the appellant's ground in the way he did, and that, it not being shewn that he obtained leave to prosecute from the Commissioner, he has no standing, and that he should have been put out of Court; and therefore that this appeal should be allowed with costs before this Court as well as before the Gold Commissioner.

MACAULAY, J.:—This is an appeal from the judgment of the Gold Commissioner of the Yukon Territory, pronounced herein on 20th April, 1907, whereby it was adjudged that the representation work required to be done in order to entitle defendant Wenzel to a renewal grant to creek claim No. 59 A below discovery on Sulphur Creek, in the Yukon Territory, was insufficient, and ordering that the grant of said placer mining claim issued to the defendant on 6th December, 1906, be cancelled; that the application of the plaintiff for a grant of said claim be granted; and that a grant issue to the plaintiff for the said claim.

The facts of the case disclose the following circumstances. Creek placer mining claim No. 59 A below discovery on Sulphur Creek was originally recorded on 23rd November, 1897, and was duly renewed to 23rd November, 1906. On the morning of 24th November, 1907, at a few minutes past midnight of the 23rd, the plaintiff relocated the said claim, on the ground that insufficient representation work had been done, and, on the same day, made application for a record of the same in accordance with the provisions of the Yukon Placer Mining Act.

The defendant, within the 14 days allowed by the Yukon Placer Mining Act, filed his affidavit of representation, and, on 6th December, 1906, procured a renewal grant of the claim in accordance with the provisions of the Act. The plaintiff then filed a protest, and, on the hearing and determination of the protest before the Gold Commissioner, he gave his judgment as above stated.

Section 41 of the Yukon Placer Mining Act, ch. 64, R. S. C. 1906, sub-sec. 2, relating to the renewal of grants, provides as follows: "Such person shall, upon receiving such grant, be entitled to hold the claim for the period mentioned therein, with the absolute right of renewal from year to year thereafter, upon payment of the

renewal fee prescribed in said schedule, provided such person during each year of the period, and during each year for which such renewal is granted, does or causes to be done work on the claim to the value of $200, in accordance with a schedule to be prepared by the Gold Commissioner and approved by the Commissioner, and files, within 14 days after the date of the expiration of the said period or renewal thereof, with the mining recorder or his agent, an affidavit made by him or his agent stating that such work has been done and setting out a detailed statement thereof."

Section 42 provides as follows: "In the event of the work referred to in the last preceding section not being done as therein provided, the title of the owner to the same shall thereupon become absolutely forfeited, and the claim shall forthwith be open for relocation."

Section 43 provides a remedy for the owner who has done his work but has failed to renew his grant.

Section 44 provides as follows: "No title shall be contested by any one who does not claim an adverse right, except by leave of the Commissioner. In the event of a claim reverting to the Crown as a consequence of litigation undertaken pursuant to such leave, the plaintiff shall have the first right to locate the said claim."

In Grant v. Treadgold, in our own Court, 4 W. L. R. 173, it was held by Craig, J., that if a claim was not renewed within the year, then after midnight on the last day for renewal of the claim, under the provisions of the mining regulations then in force in this country, the claim became immediately forfeited to the Crown, and open for relocation and occupation by a free miner, and that no other step was necessary on the part of the Crown to complete the forfeiture, notwithstanding the original grantee still remained in possession of the claim; that under the rules, by a statutory fiction, the claim was surrendered to the Crown and was at once open for occupation and relocation by a free miner.

Mr. Justice Dugas, giving judgment in the same case, was of opinion that, notwithstanding the failure of the original grantee to do his assessment work, he would still be in possession at the end of his year, and it still required some act on the part of the Crown to declare his claim forfeited before it would be open for occupation. In other words, following the decision of Osborne v. Morgan, 13 App. Cas. 227, he was of opinion that there must be "office found"

on the part of the Crown before the claim would be open for occupation and relocation by a free miner.

In that judgment I did not express any views upon this point, because, owing to the view I had taken of the case, it was unnecessary for me to enter into a discussion of the point.

Since that case was decided, the mining regulations then in force have been repealed, and the Yukon Placer Mining Act substituted therefor, which came into force on 1st August, 1906.

After carefully reading the provisions of the Act, I am of opinion that secs. 41, 42, 43, and 44 must be read together, and that, if the grantee has failed to perform his $200 worth of work within the year, or, having done that work, failed to renew within the 14 days after the date of the expiration of the said period for doing the work, then, under sec. 42, at the end of the 14 days, by a statutory fiction, the title of the owner to the claim shall thereupon become absolutely forfeited, and the same shall forthwith be open for relocation.

Section 43 provides the remedy for the owner of the claim who has performed his work, but has not filed his renewal within the 14 days, and sec. 44 provides the remedy for the person who contests the right of the owner to a renewal of the claim, on the ground that he has done insufficient representation work, or no representation work at all, and has obtained his renewal by fraud.

I do not think it could be argued that, if the owner performed his $200 worth of work, but failed within the 14 days thereafter allowed for the proving of the same to file the necessary affidavit, or to renew his grant to the same, it could be held that the claim was open for relocation until after midnight of the 14th day after the expiry of the year, and I am clearly of the opinion that, whether he has performed the work or whether he has not performed the work, as required by sub-sec. 2 of sec. 41, the claim does not become forfeited and open for relocation until the end of the 14 days, and during the 14 days after the end of the year he still remains in lawful occupation of the said placer claim for mining purposes. Under sec. 17 "no claim that is lawfully occupied for placer mining purposes is open for location."

I am, therefore, of the opinion that on the morning of 24th November, 1906, when the claim in question was

attempted to be relocated by the plaintiff, it was not land that was unoccupied and open for location under the provisions of the Yukon Placer Mining Act, and on this ground I am of opinion that the judgment of the learned Gold Commissioner should be reversed.

But let us consider the facts in this case. Two men, by the names of Ballentine and Brown, had been employed to do the representation work upon this claim, in accordance with the schedule in force in the Yukon Territory, and upon the question of schedule there was some argument that, if Ballantine and Brown did the work which they claim to have done, it was not sufficient to represent the claim, because they had done the work according to schedule exhibit C.2, which came into force on 8th November, 1901, and which the respondents argue was superseded by schedule exhibit D., which was published under sec. 27 of the Yukon Mining Code, to take effect 1st November, 1906, and that, having once published that schedule, the officers of the government could not withdraw it and substitute schedule exhibit C.2 in place thereof.

Mr. Gosselin, the Gold Commissioner, was examined, and stated that schedule exhibit D. had been prepared and published by the Gold Commissioner and the Commissioner of the Yukon Territory on 18th September, 1906, but that, as it was found defective, it was withdrawn before the time it was to take effect, and that all the mining recorders were notified to act according to the provisions of schedule exhibit C.2, and that in fact they did act upon that schedule and no other schedule until 1st January, 1907.

I am of opinion that, under the circumstances, in any event, we must take it that schedule exhibit C.2 was the schedule that was in fact in force until 1st January, 1907, and that if the defendant, or his agents, complied with the provisions of that schedule in doing their assessment work, it was sufficient compliance with the law in that respect.

Ballentine and Brown, who did the assessment work, or a part of it, on this claim, swear that they sank a shaft to bed rock 34 feet, between the 15th and 23rd days of November. One Thomas R. Moore and one Philip Ivey, who also did some work on this claim, swear that they measured the shaft, or assisted in measuring it, and found it to be about 34 feet deep. The plaintiff states that he measured this hole

on 14th December with two men named Lewis Jensen and James O. Shoop, and, after careful measurement, they found the hole 29 feet 6 inches deep. Jensen and Shoop both swear to the correctness of this measurement

The Gold Commissioner says: "Without further comment I find that the measurement made by the plaintiff and the two men with him was correct. A shaft 29 feet 6 inches deep is not sufficient work to represent a claim."

He further says: "For the same reasons that I have given in the case of Palmgreen v. Tabor, I am of the opinion that the plaintiff had the right to stake the claim in question when he did, and that he had a right to bring this action—" and decides in favour of the plaintiff.

The Gold Commissioner does not tell us why he chooses to believe the plaintiff and his two witnesses in preference to the 4 men who worked upon the ground, and measured the work after they completed it The defendant's workmen certainly did, it is admittted, the greater portion of the assessment work. One of the plaintiff's witnesses says that they did about $150 worth of work, but, even according to the schedule, they must have done more than that, as they did within (according to the plaintiff's evidence) 3½ or 4½ feet of the total amount of work required to be done.

I doubt very much, even on the evidence, the onus being on the plaintiff to prove his case, that I could have come to the same conclusion as the Gold Commissioner has arrived at.

Again, sec. 25 of the Placer Mining Act provides the manner in which a claim shall be staked, and sub-sec. 1 states as follows: "Every claim shall be as nearly as possible rectangular in form, and shall be marked by two legal posts firmly fixed in the ground on the base line at each end of the claim." Sub-section 5 is a saving clause, and provides that "failure on the part of the locator of a claim to comply with any of the provisions of the preceding sections shall not be deemed to invalidate his location, if upon the facts it appears to the satisfaction of the mining recorder that there has been on the part of the locator a bona fide attempt to comply with the provisions of the Act," etc.

The plaintiff, in his evidence, states that there was a base line run on this claim; that it could be easily seen; but that

at the time of year at which he staked, owing to the frozen condition of the ground, it would be difficult to drive stakes into the ground, and he therefore did not attempt to do so, but tied his stakes to the old stakes of the original locator, which were not less than 50 feet away from the base line. He made no attempt to sink those stakes where he could easily have done so, and I am of the opinion that his staking was of such a nature as not to comply with the provisions of sec. 25, and there is no evidence that the mining recorder was of opinion that a bona fide attempt had been made to comply with the provisions of the Act, and for my part I am unable to see how any mining recorder could come to the conclusion that such bona fide attempt had been made by the plaintiff.

For all these reasons, I am of opinion that this appeal should be allowed with costs, and that the judgment of the Gold Commissioner should be reversed with costs.

SASKATCHEWAN.

WETMORE, C.J. OCTOBER 3RD, 1907.

CHAMBERS.

RE GRAY.

Infant—Custody—Application of Father against Stranger—Return to Habeas Corpus—Agreement for Adoption—Alleged Criminal Misconduct of Father—Moral Rehabilitation.

Motion by Robert T. Gray, upon the return to a writ of habeas corpus, for an order upon Jesse Balkwill for the delivery up to the applicant of the person of his infant child Vina Almira Gray, alleged to be detained by Balkwill.

W. A. Nisbet, Moosomin, for the applicant.

E. R. Wylie, Moosomin, for Balkwill.

WETMORE, C.J.:—This matter having come before me pursuant to notice, a number of technical objections were

taken to the writ of habeas corpus and to the notice served upon Balkwill. These objections were overruled, and thereupon the writ of habeas corpus, with Balkwill's return, was filed. That return is as follows:—

"I, Jesse Balkwill, in obedience to the writ of habeas corpus herewith, do certify and return that:

"1. In or about the month of June, 1902, the said Robert T. Gray had some disagreement and unhappy differences with his wife, and she left his household and refused and has ever since refused to live with him, and in or about the month of February, 1903, and under the above conditions, the said Gray requested me to take possession, charge, and control of the said Vina Almira Gray, who was then about 3 years of age, and to rear the said child, and he then agreed with me that I should adopt and bring up the said child as my own, and I, in consequence of such request, took possession and have ever since had possession of said child under said agreement.

"2. The said Gray is not a fit or proper person to have the charge, custody, or control of said child: about two years ago the said Gray attempted to commit rape upon his daughter Mabel Gray, who was then a girl of about 17 years of age, and living with him, the said Gray, and his said daughter at such time swore out an information against the said Gray charging him with said offence; the said child, if in the custody of the said Gray, would be improperly restrained and her morals contaminated, and it is in the interests of the material and moral welfare of the said child that she remain in the custody of myself or that she be delivered to the custody of her mother.

"Dated this 1st day of October, A.D. 1907.

"Jesse Balkwill."

The first paragraph of this return is bad and does not justify the defendant in retaining the possession of the child. I held that in a previous judgment in this case, which is reported in 6 W. L. R. 374.

The matter set out in the second paragraph of the return is entirely new. In shewing cause against the issue of the writ, the affidavits alleged that it was not in the interest

of the moral welfare of the child that she should be returned to the possession of the father, but as stated in my judgment reported in 6 W. L. R. at p. 375, that was based purely upon the alleged fact that Gray had no females in his house to look after the child. This charge of improper moral conduct of a serious character with one of his daughters was not brought before me until set out in this return. I think it is most extraordinary that this course was taken. It is not alleged or pretended that this information was recently obtained, and it certainly has the appearance to me of being matter that was kept back with a view of vexatiously hindering the applicant from obtaining possession of his child. Nevertheless, the matter is of such a serious character that were it not for certain matters brought under my notice I would be disposed to have an inquiry held in some way, but under the circumstances of this case I do not consider it necessary. In In re Fynn, 2 DeG. & Sm. 457, at p. 474, Knight Bruce, V.-C., speaking of the practice of the Court in respect to the custody of infants, states as follows: "Before this jurisdiction can be called into action it (meaning the Court) must be satisfied, not only that it has the means of acting safely and efficiently, but also that the father has so conducted himself, or has shewn himself to be a person of such a description, or is placed in such a position, as to render it not merely better for the children, but essential to their safety or to their welfare, in some very serious and important respect, that his rights should be treated as lost or suspended—should be superseded or interfered with." This statement of the law was approved of by Kindersley, V.-C., in In re Curtis, 28 L. J. Ch. at p. 460, and by Coleridge, C.J., in In re Goldsworthy, 2 Q. B. D. at p. 82.

Assuming that Gray, the father, was guilty of the immoral conduct charged with respect to his daughter Mabel (and this is disputed), it occurred two years ago. No proceedings appear to have been taken with respect to any charge of the character mentioned beyond swearing out the information. I do not know that I would put very strong emphasis upon that fact, because I can quite understand how, if the charge were true, the family relations existing between them might prevent the matter being brought into the Courts. The question that presents itself to my mind is: assuming that two years ago he had been guilty of this immoral con-

duct, is there no locus pœnitentiæ? Can he never recover possession of his child afterwards? I think that the authorities are the other way.

The case of Swift v. Swift, 13 W. R. 731, relied upon by Balkwill in support of his return, supports the proposition that such conduct would not be the ground of perpetually preventing him from obtaining the custody of his child. In that case the father had actually criminally assaulted his daughter, who informed her mother, and in consequence she left him, with the child, at once, and a deed of separation was drawn between her and her husband, in which it was provided that their children should at all times thereafter be under her sole care, management, and protection. The father after this attempted to get possession of the child, and a suit was brought to restrain him from prosecuting any proceedings to obtain the custody of his children. The Master of the Rolls made a decree perpetually restraining the husband as prayed for. On appeal, the Court held that the restraining order ought not to have been perpetual, and made the decree so as to restrain the defendant until further order of the Court. This, it seems to me, could never have been done if the Court had not considered that the father might afterwards put himself in such a position, morally and otherwise, as to be entitled to the custody of his children. I feel that I am at liberty to look at the material on file and the facts that have been brought under my notice by the previous proceedings herein, and, as I stated in my judgment to which I have before referred, at p. 736, the affidavits disclose that the father "is a man able to support the child, of good moral character, a regular attendant at bible class and church services, and causing his children to regularly attend Sunday-school, day-school, and church—he is the father of other children besides Vina Almira," and he has females in his house to look after the child. I cannot but come to the conclusion that the man, if he ever was guilty of this offence, has put himself in such a position that I cannot say, under the authority of In re Fynn, that he is not a fit person to have the custody of the child.

I must therefore order the child to be delivered up to him. Balkwill will pay the costs of these proceedings.

ALBERTA.

STUART, J. OCTOBER 5TH, 1907.

TRIAL.

SWANSON v. MOLLISON.

Mechanics' Liens — Lien of Sub-contractor — Pleadings— Amendment—Filing of Claim of Lien—Time of Completion of Work—Architect's Certificate—Unimportant Work Done after Substantial Completion—Promissory Notes Taken by Sub-contractor from Contractor—Discount—Non-extinguishment of Debt—Notes Retired by Sub-contractor — Statement of Sub-contractor as to Amount Due — Estoppel — No Alteration in Position — Nothing Due from Owner to Contractor—Provisions of Alberta Mechanics' Lien Act—"Owing and Payable"— Lien Arising on Commencement of Work—Amount for which Lien to be Enforced—Change in Specifications— Extras—Interest.

Action to enforce a mechanics' lien.

James Short, K.C., for plaintiffs.

R. B. Bennett, K.C., for defendants.

STUART, J.:—The plaintiffs were sub-contractors under the defendant Thomas McCaffrey, who had entered into a contract with the defendants the Mollisons for the erection of a building upon the premises known as Braemar Lodge, in the city of Calgary. The contract price, including small amounts for extras, was $21,758.50. The plaintiffs' sub-contract was for the mason work, and the original contract price for this was $4,355, but there was a claim for extras amounting to $1,667. The main contract provided for the superintendence of the work by Messrs. Lawson & O'Gara, architects, and for the payment to the contractor of monthly instalments upon the contract price, amounting to 85 per cent. of the work done and material supplied. The work was commenced in the spring of 1906, and the first architect's certificate was issued on 23rd April, 1906, for $4,000. The last certificate issued was issued on 31st August, 1906,

for $3,000. This last certificate brought the amounts certified and paid to the defendant McCaffrey at that date up to the total sum of $16,000. The plaintiffs had during this time been engaged in the performance of their sub-contract, and had received certain payments from the defendant McCaffrey on account. Subsequently McCaffrey got into difficulties and became unable to complete his contract. On 14th January, 1907, the plaintiffs filed a lien under the Mechanics' Lien Act for the sum of $3,047.40, which they alleged was the balance due to them from the defendant McCaffrey, and this action was begun on 12th February, 1907, to enforce the lien.

The defendants the Mollisons pleaded in their defence that the plaintiffs had stated to them and to the architects that McCaffrey owed them only the sum of $1,200, and that subsequently to this statement the work done by the plaintiffs amounted only to $351 in value, and they brought $1,551 into Court, and pleaded that the plaintiffs were estopped by reason of the aforesaid statement from claiming any larger sum. The only other plea was to the effect that "the plaintiffs were not entitled to maintain a lien in respect of lands and buildings as in their statement of claim alleged."

At the trial counsel for the plaintiffs insisted that in view of the state of the pleadings the defendants should begin. Counsel for the defendants argued that the second plea above quoted put in issue all the allegations made in the statement of claim, and refused to begin. Counsel for the plaintiffs then asked for judgment on their statement of claim, upon the ground that there had been no specific denial of the allegation contained therein. I agreed with this view, but, on examining the statement of claim, I discovered that it contained no specific allegation as to the exact date upon which the plaintiffs had ceased to work upon the building, and there was therefore nothing to shew on the face of the pleadings whether or not the claim of lien had been filed within the time specified by sec. 13 of the Mechanics' Lien Act. Upon this the plaintiffs consented to begin, and, calling a witness to prove the omitted allegation, asked leave to amend their statement of claim accordingly. I allowed the amendment, and the trial proceeded, but without any amendment being made or suggested in respect of the statement of defence.

The point of real difficulty in this case was never mentioned at the trial at all, but was entirely obscured by a contest over other points upon which there can be little doubt.

The first position taken by the defendants was that the claim of lien had not been filed in time. On 19th November Messrs. Lawson & O'Gara had handed to the plaintiffs the following letter:—

Calgary, November 19, 1906.

Thomas McCaffrey, Esq., City.

RE BRAEMAR LODGE.

Dear Sir,—We beg to intimate to you that the mason and brick work on the above building is quite satisfactory to us, and, with the exception of one or two minor items, is complete.

Yours truly,

LAWSON & O'GARA, Architects.

This letter was written in order to enable the plaintiffs to get some more money from McCaffrey. The plaintiffs did no further work on the building until 19th December, when one of the plaintiffs and two of their men spent about half a day in doing what was called "some beam filling" in the stone work, some "pointing" on the outside, and filling up some joints with red mortar. The defendants contended that this work was so unimportant that the work should be held to have been substantially completed prior to 19th November, and that therefore the filing of the lien on the 14th January was too late. I am unable, however, to accede to this view. It will be observed, in the first place, that the new Act does not contain the expression "completion of the work." Section 13 of the new Act provides that the lien "shall absolutely cease to exist after the expiration of 31 days. . . . after the claimant has ceased from any cause to work thereon or place or furnish the materials therefor." The cases, therefore, which contain interpretations of the term "completion of the work" do not furnish much assistance. However, even if the old wording had been retained, it seems to me that the letter of 19th November is a clear admission by the architects, who were the agents of the owners, that the work was not then complete. Under the contract the architects were to be the judges, at any rate

as between the owners and McCaffrey, as to when the work was complete. It may be doubted, of course, whether this contract should govern as between the owners and the sub-contractors, and, therefore, whether the decision of Mulock, C. J., in Vokes Hardware Co. v. Grand Trunk R. W. Co., 12 O. L. R. 344, 7 O. W. R. 537, affirmed on appeal, 8 O. W. R. 24, is in point. My experience, however, leads me to think that had the position been reversed and had it been in the owners' interest to deny completion, the work which was still undone on 19th November would have assumed a much greater importance. At any rate, I hold from the evidence that the plaintiffs were on 19th December still doing work which needed to be done, and that, therefore, they had not until that date at least ceased to work upon the building. It might be contended that, as the plaintiffs did no work at all between 19th November and 19th December, they therefore on the prior date ceased to work upon the building, and that with respect to all work previously done the time for filing their lien would lapse on 19th December, and that the doing of some slight amount of work on the latter date would not extend the time. If it could have been established that the plaintiffs merely came back to the building in order to keep the time running by doing some unnecessary details, it is possible that this view would be correct; but, in view of the terms of the letter of 19th November, it seems to me clear that it was then contemplated by the architects that some additional work should be done by the plaintiffs, small and relatively unimportant though it might be. The fact that the plaintiffs allowed a considerable interval of time to elapse before doing this work does not seem to me to be material. If they had come back on the 21st day instead of the 31st, I think no question would have been raised. No doubt it is peculiar that it was on the 31st day after the date of the letter that the final work was done. Something may, perhaps, have been in the mind of the plaintiffs which induced them to return and do the work on that particular day, but I do not think that it would have made any difference if they had delayed even some days longer. The owners, I think, cannot get over the fact that their architects considered the work still incomplete. One of the plaintiffs indeed swears that a few days prior to doing the work Mr. Lawson told him that there was still something to be done. I

concluded, therefore, that the lien was filed within the time prescribed by the Act.

The evidence disclosed the fact that the plaintiffs had taken several promisory notes from the defendant McCaffrey, and it was contended on behalf of the owners that, as these notes had been discounted at the bank, the debt had been extinguished, and the lien given by the statute was therefore gone and could not be revived by the dishonour of the notes. The evidence upon this matter was not very clear. The defendant McCaffrey was indebted to the plaintiffs in respect of work upon other buildings, and had given the plaintiffs several promissory notes upon their general account. There was no note ever given for the specific debt upon which this action was brought, and for which the defendant McCaffrey has allowed judgment to go against him by default. More than this, it appeared that the total indebtedness of McCaffrey to the plaintiffs had never been fully covered by promissory notes, although the exact amount uncovered was not stated. In these circumstances, I doubt very much, quite aside from the provisions of sec. 7 of the Act, if the case of Edmonds v. Tiernan, 21 S. C. R. 406, would apply. At any rate the British Columbia statute under which that case was decided did not contain any such provision as is contained in sec. 7 of our statute. The defendants referred also to the case of National Supply Co. v. Horrobin, 16 Man. L.R. 472, 4 W. L. R. 570, in which Mathers, J., held that a provision in the Manitoba Act similar to that in our sec. 7 did not save the lien where the note had been discounted. If it were necessary here to decide the point, I would hesitate considerably before following that case If it is good law, the effect of the statute seems to me to be that the lien-holder may take a promissory note, and, as long as he keeps it in his pocket, where it is of no use to him, his lien is preserved; but if he uses the note for the very purpose for which notes are almost invariably taken in such cases, that is, by discounting it at his banker's and getting some money upon it, then his lien is destroyed. If this is his position, then sec. 7 of the statute is of very little benefit to any one. In Wallace on Mechanics' Liens, p. 150, there is the following note to the similar clause in the Ontario statute: "After the note has been negotiated, the debt then becomes due to a third party, and the original creditor becomes guarantor of the payment of the debt. While the note is in the hands of the third

party, no proceedings can be taken to enforce the lien. If the lien claimant pays the note, and is the holder of the note at the time he begins proceedings, the fact of his having negotiated the note will not take away his lien." This paragraph seems to me to contain a much more reasonable principle than that contained in the Manitoba case. It may be reasonable enough that no proceedings should be taken to enforce the lien while the note is in the hands of a third party, but I cannot see why the lien-holder, who is still liable on the note, should be irrevocably deprived of his security against the land simply because he has used the note in the way it is in nearly every case intended to be used, and yet be protected by the statute if he makes no use of it at all. In this particular case I think it can be fairly inferred from the evidence that the plaintiffs had paid the notes of McCaffrey by giving a note of their own directly to the bank prior to the issue of the writ. A note for $1,825.79 signed by the plaintiffs in favour of the bank was put in evidence. This note was dated 18th January, 1907, and it was stated that it was a renewal of a prior note for $2,500 which had been given to cover the amount of McCaffrey's notes which had been dishonoured. Another fact which possibly distinguishes the present case is this: that here the notes were not given by the owners against whose lands the lien is claimed, but were given by the contractor to sub-contractors. Even if, therefore, the bank is still the holder of the notes, though I would gather from the somewhat meagre evidence that it is not, I do not see what difference that can make to the Mollisons. No note of theirs, at any rate, is outstanding and in the possession of a third party. Thus the main reason why no proceedings should be taken to enforce the lien against an owner where a note has been given and discounted does not exist. It seems to me that sec. 7 of our Act enables me to distinguish Edmonds v. Tierman, and, instead of saying that the debt being gone the security is also gone, to say that the statute gives a security for the price of the work: that security means, to my mind, freedom from danger, that the danger is not removed by the mere discounting of the note, and that as long as the danger lasts the security should last. True the sub-contractors got the "price of the work," which was temporarily in their pockets, but, to use a popular expression, it had a long string to it. Their danger was not gone till the note was finally paid, and I see no reason why

they should not be allowed, if grave danger threatens, to take up the note, as was done here, and then proceed to enforce their lien, so long as they do so within the limited time. I think, therefore, aside from the question of uncertainty as to amounts, that the plaintffs are entitled to say as against the Mollisons that at the time of the commencement of the action the original debt due to them from McCaffrey was still unpaid, and that the lien given them by the statute had not been destroyed by anything which had occurred.

I have treated these two grounds by the defendants in respect to the date of filing the lien and in respect to the taking the notes as if a proper plea had been on the record to sustain them, because I intimated at the close of the trial that any amendment necessary upon which to base the evidence given and the arguments made would be allowed.

With respect to the question of estoppel, I am of opinion that the defendants cannot succeed on this ground either. The answers given by the plaintiff to the questions asked them by Lawson and by the defendants as to what McCaffrey owed them were clearly given only approximately, and before the defendants could be entitled to rely upon these answers and hold the plaintiffs bound by them, I think something more should have taken place. There is nothing to shew that the plaintiffs knew that the defendants intended to rely upon the answers given and to alter their position in any way in consequence of them. If the defendants intended to alter their position and to rely upon the answers in doing so, it appears to me that it was their duty to inform the plaintiffs of that fact and thus to put them upon their guard. Besides, I have failed to discover wherein the position of the defendants was altered to their disadvantage in any way by what occurred. At the time the answers were given McCaffrey had failed and had practically acknowledged his inability to complete the contract. No further payments were made to him thereafter, and all that the defendants did was to go on and employ other workmen to complete the work. This had to be done in any case, and the payments made to those workmen amounted to no more than $1,068.76. McCaffrey had been paid $16,000, and there was, therefore, still a large balance remaining unpaid upon the contract price. The payment into Court by the defendants of $3,017.04 in the suit of the Western Planing Company against them was not made until long after this action was

begun. It is true that, if the plaintiffs' claim is allowed, it will bring the total payments about $145 over the contract price, and it is also true that the architect says that some $2,000 more will still be needed to complete the work according to the specifications. But I fail to see what different course the defendants could have pursued if the full amount of the present claim of the plaintiffs had been stated in the first instance. The work done by Bishop and Porter, who were employed by the architects to continue the work, and which amounted, as I have said, to $1,068.76, was surely necessary to be done in any case. It was not suggested that the defendants would have left the work incomplete. No doubt, McCaffrey's failure will cause considerable loss to the defendants, or at any rate they will have to spend considerably more money than the contract price in order to get what they bargained for, but I do not see how all this can be considered such an alteration in the defendants' position as to work an estoppel against the plaintiffs. It is by no means a consequence of statements of the plaintiffs which are complained of. For these two reasons, therefore, I hold that the plaintiffs are not estopped from shewing the true amounts of the indebtedness of the defendant McCaffrey to them.

I come now to the point in the case which presents to my mind a real difficulty. Section 32 of the Act is as follows: "No lien except for not more than 6 weeks' wages in favour of labourers shall attach so as to make the owner liable for a greater sum than the sum owing and payable by the owner to the contractor." Section 17 contains the following provision: "As to all liens except that of the contractor, the whole contract price shall be payable in money, and shall not be diminished by any prior or subsequent indebtedness, offset, or counterclaim, in favour of the owner against the contractor."

In this case the contractor has never completed his contract. As fas as any set-off or counterclaim for damages is concerned, the latter provision which I have quoted would prevent the former provision contained in sec. 32 from working any disadvantage to the plaintiffs. But the difficulty lies in this: that at the time of the commencement of the action, at any rate, there was admittedly no sum whatever owing and payable by the owner to the contractor. The contractor had been paid $16,000 up to the 31st August, and the

architect had refused to issue any further progress certificates. During the currency of the work, however, various sums had become owing and payable by the owner to the contractor under the architect's progress certificate and the provisions of the contract. The question is: What does sec. 32 mean? "Owing and payable" when?

It will be observed that a very radical change has been made by the new Act in the law respecting mechanics' liens. By sec. 9 of the old Ordinance the owner was protected if he made payments in good faith and without notice to the contractor up to 90 per cent. of the contract price, and such payments operated as a discharge pro tanto of the lien given by the Ordinance. Had this section been retained in the new Act, the question would have been simple. It seems to me that the omission of it indicates a definite intention on the part of the legislature to remove the protection which it had heretofore given to the owner, and to make his property liable even though he may have made payments in good faith and without notice up to the amount earned by the contractor. It cannot be the meaning of sec. 32 that the amount owing and payable is to be ascertained at the time of the commencement of the action, because, in that case, the provision for the retention of 10 per cent. of the contract price having been wiped away, the owner might, by making payments the very day before the commmencement of the proceedings, destroy the lien-holder's rights entirely. The same remarks would apply if the date of filing the lien were to be taken.

It is, I think, clear that the lien arises immediately upon the commencement of the work. Sec. 13 speaks of the lien "ceasing to exist unless" the claim is filed within a certain time, and in the interpretation clause, sec 2, sub-sec. 4, the word "owner" is declared to include "all persons claiming under him whose rights are acquired after the work in respect to which the lien is claimed is commenced or the materials furnished or even commenced to be furnished." These latter words clearly indicate to my mind that the lien arises as soon as the work is commenced. See Robock v. Peters, 13 Man. L. R. at p. 138. Having once arisen, I am of opinion that the effect of the new Act is to make the lien attach to the extent of any sum which may at any time thereafter become owing and payable by the owner to the contractor. This is a very radical change, and there is far greater responsibility than ever upon the owner, but possibly if it has

the effect of driving owners to the expedient of dispensing altogether with the services of middlemen in the form of irresponsible contractors who undertake work far beyond their business ability and financial capacity, and of dealing more directly with the men who do the actual work and supply the actual materials, the result may not be determined to the best interests of the community.

In this case a total sum of $16,000 became owing and payable to the contractor McCaffrey during the progress of the work, and I am therefore of opinion that there is nothing in sec. 32 which would prevent the plaintiffs' lien attaching for the amount claimed. Such cases as Black v. Weibe, 1 W. L. R. at p. 77, cannot apply to the circumstances here, because they were decided under the Manitoba statute, which still retains the old provision in respect to payments made in good faith and without notice.

The point which I have just considered and disposed of, it will be observed, was not raised by the pleadings or upon the argument, and I am not sure that the defendants could have complained if I refused to consider it, even if my conclusion had been in their favour; but, as the point is a very important one, involving the interpretation of the new Act, I thought it better that judicial discussion should begin as soon as possible in order that the true meaning of the statute may be the earlier arrived at.

There remains to be considered the question of the proper amount for which the plaintiffs are entitled to a lien. The difficulty, which has been to me a perplexing one, arises in connection with an extra charge for $1,000 which the plaintiffs make, owing to their having used a more expensive kind of brick than that which was provided for in the specifications. These latter stipulated that the brick were to be "Strathcona red brick selected and of uniform colour." The plaintiffs made two attempts to provide the kind of brick specified, but in each case the bricks were, as I think, properly rejected by the architects. The plaintiffs then proposed to use what were called "Watson pressed brick," and after some conversation with the architect these were put in. Now, the strength of the plaintiffs' case seems to me to lie in this, that there never was any separate amount specified as between the Mollisons and McCaffrey which the mason work was to cost, and there was no contract of any kind between the Mollisons and the plaintiffs. The plaintiffs made a contract with Mc-

Caffrey to do the mason work for a certain sum, and there is no doubt that as between the plaintiffs and McCaffrey there was an agreement that owing to the change in the kind of brick used this amount should be increased by the sum of $1,000 because McCaffrey assented to the increased charge, as is shewn by the order which he gave for $3,000 on 3rd January. The statute gives the sub-contractor a lien for the price of his work, and this price, of course, is fixed not by any agreement between the owner and the sub-contractor, but by agreement between the sub-contractor and his immediate superior, the contractor. As long as the owner is not made liable for any larger sum then is owing and payable to the contractor, it can make no difference to him what the contractor may see fit to allow his sub-contractor for a certain portion of the work. In this case, supposing McCaffrey had completed his contract pursuant to its terms, it could make no difference to the Mollisons what amount the plaintiffs were to get for the mason work from McCaffrey, or what amount should be covered by the plaintiffs' lien, as long as they were not obliged to pay more than the contract price. The result of McCaffrey allowing an extra $1,000 to the plaintiffs would only be that his profits would be decreased by that amount. The Mollisons, through their agent Lawson, at any rate consented to the Watson brick going into the building, and there is no complaint either as to the quality of the brick or the workmanship. The defendants say that they should not be obliged to pay any more for the mason work than the amount agreed upon, but the trouble is that there was no separate amount agreed upon by them for the mason work. If the defendants had observed the obligation which the new Act places upon them, there would, in view of sec. 3 of the Act, at least have been $12,000 out of which the plaintiffs' claim could have been satisfied, and that without making them liable for any greater sum than they were bound to pay McCaffrey under the contract, as I have already pointed out. This argument has appealed to me with great force, and yet I hesitate to allow it to prevail in this case. The plaintiffs say that in the interview with Lawson in regard to the change in the brick the latter told them to go ahead and put in the brick, and that he (Lawson) said something about their getting something extra or about seeing Miss Mollison in regard to it, and they say that they told Lawson that the brick would be "extra." I cannot gather

from this evidence of the plaintiffs that there was any definite promise by Lawson that anything extra would be allowed to McCaffrey, while Lawson himself says that he told them specifically that McCaffrey would not be allowed anything more on account of the change. The contract called for Strathcona brick, and it was this that McCaffrey and the plaintiffs under him were bound to supply. They made two attempts to do so and failed. In order to carry out the terms of the contract, McCaffrey and the plaintiffs under him were obliged to suggest the change in the quality of brick. The change was assented to by Lawson on behalf of the defendants, but, in doing so, he either expressly declared that the change must not entail any additional responsibility on the defendants, or, adopting the plaintiffs' account, he left the matter in doubt as to whether anything extra would be allowed. McCaffrey and the plaintiffs were in difficulties as to carrying out the provisions of the contract, and, in adopting the expedient they did, they at any rate had warning that the defendants might ultimately refuse to have any additional financial responsibility placed upon them on account of the change. The plaintiffs themselves admit that there was no express agreement arrived at. Owing to McCaffrey's failure, the practical result has been that, if this claim is allowed, an additional responsibility will be placed upon the defendants. The rights of a lien-holder are given by statute, and the rule is clear that he must establish his rights plainly and beyond a doubt before the lien will attach. The statute is oppressive enough as it is upon owners, and I cannot think that it was ever intended that the remedy given to a sub-contractor should be extended to the length to which I would have to extend it if I were to allow this particular claim. I therefore conclude, though with some hesitation, that the plaintiffs are not entitled to a lien for the $1,000 claimed in respect of the difference in cost of the Watson pressed brick. The small claim for interest will also, of course, be disallowed.

The result is that the plaintiffs are entitled to a lien for the amount of their claim, less the $1,000 mentioned, less the $7.40 for interest, and less the sum of $1,551 which was paid into Court. There will, therefore, be an order that the sum of $1,551 paid into Court be paid out to the plaintiffs, and a declaration that the plaintiffs are entitled to a lien upon the property of the defendants the Mollisons, set

forth in the statement of claim, for $488.60, being the balance of their claim remaining after the said deductions are made, this lien to be subsequent to the mortgage of the defendants Hull and Burns.

The plaintiffs will be entitled to their costs of the action.

MANITOBA

OCTOBER 18TH, 1907.

COURT OF APPEAL.

COTTER v. OSBORNE.

Contempt of Court — Attachment — Practice—Rule 704—Notice—Material on Application.

Appeal by defendant George Litster from order of DUBUC, C.J.M. The action was brought by a number of master plumbers against union men for picketting, boycotting, and conspiracy. The defendant George Litster, a member of the local plumbers' union, was ordered by MATHERS, J., on 22nd March, 1907, to produce, inter alia, the minute book of the Journeymen Plumbers Gas and Steam Fitters' Local Union.

On his examination for discovery on 26th April he refused to produce it; on 2nd May he again refused to produce it. On application to the Court on 27th May, 1907, for an order for attachment for contempt for such refusal, Mathers, J., made an order that Litster produce the book and attend for further examination at his own expense. Subsequently, upon the examination being continued on 31st May, he swore that he had lost the book, though he did not say so when he was examined on 26th April. Thereupon a further application was made on 27th July, when DUBUC, C.J.M., made an order that unless the book be deposited in the prothonotary's office within 10 days, a writ of attachment issue. Against this order Litster appealed.

H. W. H. Knott, for the defendant Litster, contended that no writ of attachment could be granted, because the copies of the orders of Mathers, J., dated 22nd March, 1907, and 27th May, 1907, served on Litster, were not indorsed

with the memorandum prescribed by Rule 290 and schedule "N" of the Rules of the Court of Queen's Bench on its equity side, prior to the passing of the Queen's Bench Act, 1895. Counsel cited Queen's Bench Rule 704, providing that "a writ of attachment against the person may be issued under the same circumstances and in the same manner and shall have the same effect as according to the practice of the Court of Queen's Bench on its equity side prior to the passing of the Queen's Bench Act, 1895." Equity Rule 290 was quoted, also Hampden v. Wallace, 26 Ch. D. 746; In re Bristow, 66 L. T. 60; Pace v. Pace, 67 L. T. 383; Stockton, etc., Co. v. Gaston, [1895] 1 Q. B. 453; In re Evans, Evans v. Noton, [1893] 1 Ch. 252; and Taylor v. Howe, 68 L. T. 213.

J. E. O'Connor and H. P. Blackwood, for plaintiffs, were not called upon, but intended to cite Thomas v. Palin, 21 Ch. D. 360, and Wallace v. Graham, 11 L. R. Ir. 369.

THE COURT (HOWELL, C.J.A., RICHARDS, PERDUE, and PHIPPEN, JJ.A.), dismissed the appeal, holding that in this case the old equity practice need not be followed, as the words "circumstances" and "manner" mentioned in Rule 704 do not embrace the material to be used on applying for a writ of attachment.

THE COURT drew a distinction between the procedure for obtaining the old ex parte writ of attachment and the present practice, whereby notice is always necessary before a writ of attachment can be obtained.

MANITOBA.

MACDONALD, J. OCTOBER 21ST, 1907.

TRIAL.

ANDREWS v. COOK.

Sale of Goods—Action for Price—Contract—Acceptance—Sale of Goods Act, sec. 6—Conduct of Purchaser—Evidence.

Action for the price of goods sold.

S. H. McKay, for plaintiff.

J. F. Kilgour, for defendant.

MACDONALD, J.:—Both parties to this action reside in the city of Brandon, the plaintiff being a retail dealer in dry goods and clothing, and the defendant a hotel keeper.

In the month of April, 1907, the defendant was about to engage in the hotel business, and in the course of conversation with the plaintiff about certain furnishings required for his hotel, the plaintiff suggested that he might buy from a wholesale house in the city of Toronto, with whom the plaintiff did business, and whose travelling representative would soon arrive in Brandon, and by so doing make a considerable saving to the defendant.

Early in April the travelling representative of the wholesale house arrived in Brandon, and the plaintiff brought the defendant to his sample room, where he was introduced.

The plaintiff then selects a quantity of goods (the greater portion of which is not of a character dealt in by the plaintiff), and gives his order, subject, however, to cancellation at any time prior to the 20th April.

The prices of the goods as ordered were made out by the traveller, and the defendant, it seems to me, would be justified in assuming that those were the wholesale prices, but another invoice is made out for the plaintiff, quoting prices much lower than in the account made out for the defendant, this having been done quite evidently by pre-arrangement between the plaintiff and the traveller, and the difference in prices making quite a substantial profit for the plaintiff.

The defendant contends that he bought through their traveller direct from the wholesale house and at wholesale prices; this the plaintiff denies, and is corroborated by the traveller, but admits that he and the defendant being friends he offered to do him a good turn in connection with the furnishing of his hotel; to use his own language, he was going to give him a good cut, meaning a reduction on the ordinary price of the goods required. From the negotiations that followed I think the defendant was under the impression that he was purchasing through their traveller direct from the wholesale house, but in this he was mistaken, as the traveller for the wholesale house could, in conformity with the usage of trade, sell only to merchants, and the sale by him was to the plaintiff, the latter at once turning the goods over to the defendant.

On 19th April, 1907, the defendant called upon the plaintiff and intimated a desire to re-consider his order, and

procured his (the plaintiff's) signature to a telegram addressed to the wholesale house in these words: "Hold goods on order for further instructions;" and had this telegram transmitted; the receipt of this telegram is not denied, and the order was withheld until after 1st May, 1907.

The reason assigned by the defendant for wishing the goods shipped in the name of the plaintiff was because of some advantage to be thus derived in freight rates, and the condition was that if he wished to cancel he could do so through the plaintiff.

On 23rd April defendant went to Winnipeg, having previously advised the plaintiff that he was going, and there concluded that he could do better by purchasing the goods there, and did so, and had them shipped to Brandon in the name of the plaintiff. On his return from Winnipeg the plaintiff says the defendant called upon him and advised him that he would require the goods (the subject of this action), and asked him to order them to be shipped, as he was anxious to have them by 24th May, and this notwithstanding the fact that the defendant had already ordered from Winnipeg.

The plaintiff swears that immediately on the return of the defendant from Winnipeg he was instructed by him to wire to Toronto for the shipment of the goods, and yet he does not do so until 1st May.

The most charitable view that I can take of the matter is that the plaintiff is mistaken, and I hold that the defendant did not instruct him to send this telegram of 1st May.

The goods arrived from Toronto on 23rd May, consigned to the plaintiff, and were by him sent by a drayman to the defendant's hotel: on arrival there the defendant refused to receive them and would not permit the drayman to unload them, but the latter said he had instructions from the plaintiff and must unload. The defendant then told him not to do so there, but to take them across to his, the defendant's store in Fourth street; but, fearing this might lead him into trouble, he immediately followed the drayman and told him to take the goods away, that he would have nothing to do with them. The drayman did, however, unload on the sidewalk in front of the store of the defendant; then the plaintiff arrived, when the defendant repeated his refusal to accept the goods, and the plaintiff replied that he would make him.

The plaintiff then made several efforts to have the goods

removed and safely placed under cover, but, owing to the lateness of the hour, was unable to secure a drayman, and, the weather threatening rain, the defendant was anxious to prevent damage to the goods, and was about to place such portion thereof as he thought might be injured by exposure in the shelter of his store, when the plaintiff arrived, and, with his assistance and that of some men procured by him, the goods were all placed in the defendant's store, the defendant still reiterating that he would not accept them and intimating that the placing of them in his building must not be construed as an acceptance by him

The defendant pleads sec. 6 of the Sale of Goods Act, R. S. M. 1902 ch. 152, and, unless the acts of the defendant as above stated constitute an acceptance of the goods, the provisions of that section have not been complied with, and the contract for the sale cannot be enforced.

Can it be said that the goods were received by the defendant in acknowledgment of a contract of sale to him? If they were not, there was no acceptance; and, taking into consideration the conduct and acts of the parties, I have no difficulty in finding that there was no acceptance, and that the goods were placed in the defendant's building for the accommodation and subject to the control of the plaintiff. There was, therefore, no contract of sale of the goods in question which can be enforced.

I dismiss the action with costs.

YUKON TERRITORY.

DUGAS, J. SEPTEMBER 9TH, 1907.

TRIAL.

HAMMOND v. STRONG.

Mortgage—Interest in Mining Claims—Representation Work—Redemption—Tender before Action—Refusal—Deed of Reconveyance—Conditional Tender—Readiness to Implement Tender — Pleading — Costs — Counterclaim—Amendment—Foreclosure.

Action for redemption of mortgaged premises. Counterclaim for sale of the same.

F. J. McDougal, for plaintiff.

F. T. Congdon, for defendants.

DUGAS, J.:—The plaintiff, being proprietor of a half interest in 10 different claims described in the statement of claim, mortgaged the same by way of sale on 27th September, 1904, and 25th March, 1905, to one Edna B. Clark, to secure the payment of the sum of $483 and such further sums as might be expended in the protection of the said properties during the currency of the said mortgages by the mortgagee, the said properties to be reconveyed on payment. The mortgagor remained, however, in possession of the said claims, and was to attend to the representation work required under the mining regulations of this Territory so as to keep them in good standing.

On 16th May, 1906, Edna B. Clark transferred the mortgages to defendant Zera Strong, for which he paid $1,638.25, being the amount stated by the said Clark to be due under the said mortgages for capital, interest, and expenses incurred in connection with the said properties.

The plaintiff now sues for redemption, and alleges that 5 of these claims were permitted to lapse and return to the Crown, and that, being restaked by the defendants Moreau and Boucher, it was represented by Strong that this was in the interest of the plaintiff, as the grouping thereof for representation purposes would be easier. This is denied and disproved, for the evidence establishes that in fact the said claims lapsed through the negligence of the plaintiff in not representing the same. Moreau staked 4 of the claims and Boucher one, it is true, but not, as alleged, for the plaintiff or for Strong, but for themselves. The circumstances under which they both staked and swore to their affidavits before Strong might have raised some suspicion that Strong was acting in collusion with them, but all of them, Strong, Moreau, and Boucher, so positively denied that the least understanding to any such effect existed between them, that nothing remained which would have justified this Court in sustaining the contentions of the plaintiff in that behalf. I therefore immediately dismissed, after hearing the case, plaintiff's claim against Moreau and Boucher as to these 5 interests.

As to the representations alleged to have been made by Strong after the claims had been restaked by Moreau and Boucher, I must say that I am not very clear as to what the plaintiff pretends they were, and Strong denies them so firmly that I could not even take notice of them, were they

to have any effect in the case contrary to what I think. Therefore, that phase of the action should not be further considered.

The plaintiff, desiring to redeem the property, caused $750 to be tendered to the defendant Strong before the institution of this action, acknowledging thereby that this sum represented to that date the capital and interest due and expenses authorized under the mortgages; asking at the same time for a reconveyance of plaintiff's interests in the whole of the 10 claims, and to that effect deeds were also tendered for signature. Strong, claiming $1,038.25, refused the tender. Besides, he could not sign the deed of reconveyance as presented because it included the interests in the 5 claims staked by Moreau and Boucher.

After the trial counsel for the defendant Strong admitted that he could not claim more than the $750 so tendered. The tender, therefore, would have been sufficient as to the amount due. The plaintiff was entitled to a reconveyance by Strong, but could not require of him an impossibility, which was the reconveyance of the interests in those 5 claims which, by her own fault, the plaintiff had, under our mining regulations, permitted to pass into other hands.

The plaintiff knew this, but she believed Strong to be in connivance with Moreau and Boucher, and in making her tender she made it a condition that the interests in the 10 claims should be retransferred to her. Already this makes her tender irregular, as being made with conditions, for "a tender to be good must not be clogged with conditions:" Jennings v. Major, 8 C. & P. 61; Mitchell v. King, 6 C. & P. 237; Greenwood v. Sutcliffe, 61 L. J. Ch. 59, [1892] 1 Ch. 1, 65 L. T. 797; and a number of other cases which could be cited, all to the same effect, referred to under the word "Tender" in the Digest of English Case Law, vol. 14.

However, Strong claiming more than what was really due (that is, $1,038.25), shewed that he would not have accepted the offer even if unconditional, and if the plaintiff had afterwards done what I think is required to keep a tender valid, there might be a question as to whether the pretensions of Strong as to the amount claimed would not have deprived him of the right to aver that the tender, being conditional, was therefore invalid; but the law requires further that a party making a tender should keep himself always in readiness to pay. The plaintiff has been far from shewing

that readiness. Evidently the $750 was not her own at the time of the tender. All that she knows about it is that it was returned to Mr. McDougal, her advocate. Her husband is not better informed, and where that amount now is, or has been, is not proven, and the inference is that the money is not available.

By her action she alleges "the tender of $750 and also a tender to the defendant Strong for execution of a reconveyance of the said placer mining interests, but the defendant Strong refused to accept the said money or to execute the said reconveyance." She does not renew, by her action, her tender. She does not declare that she has always had the money at her disposition for ready payment, and she does not bring the money into Court. In her prayer she asks:—

"1. That it be declared that the instruments hereinbefore mentioned and executed by the plaintiff were intended by way of security only for the repayment of said sum of $483 and such further sums as might be expended in protecting the said properties during the currency of said mortgage, and that the plaintiff is entitled to redeem the said mining interests on payment of the amount due in respect of the said indebtedness and interest.

"2. That the defendant Strong may be ordered to reconvey the said mining interests, free and clear of all incumbrances created by him, and to deliver up all papers and writings in his custody or power relating to the same to the plaintiff or whom she may appoint.

"2A. In the alternative damages as against the defendant Strong for misrepresentations with regard to the relocation of the properties mentioned in paragraphs 6 and 7 of the statement of claim."

In Kinnaird v. Trollope, 42 Ch. D. 615, Mr. Justice Stirling clearly states what is needed to make a tender valid and keep it in good standing. Citing Lord Chief Justice Wilde in the case of Dixon v. Clerk, he says: "In actions of debt and assumpsit, the principle of the plea of tender, in our apprehension, is, that the defendant has always been ready (toujours prist) to perform entirely the contract on which the action is founded; and that he did perform it, as far as he was able, by tendering the requisite money; the plaintiff himself precluding a complete performance, by refusing to receive it. And as in ordinary cases the debt is not dis-

charged by such tender and refusal, the plea must not only go on to allege that the defendant is still ready (encore prist), but must be accompanied by a profert in curiam of the money tendered. If the defendant can maintain this plea, although he will not thereby bar the debt (for that would be inconsistent with the 'encore prist' and 'profert in curiam'), yet he will answer the action in the sense that he will recover judgment for his costs of defence against the plaintiff—in which respect the plea of tender is essentially different from that of payment of money into Court. . . . With respect to the averment of toujours prist, if the plaintiff can falsify it, he avoids the plea altogether. Therefore, if he can shew that an entire performance of the contract was demanded and refused, at any time when, by the terms of it, he had a right to make such a demand, he will avoid the plea"—and Mr. Justice Stirling draws the following conclusions: "It, therefore, appears that if the plea of tender is to be successful at law, two matters are requisite—first, that the defendant must not only make the tender, but must always be ready to perform entirely the contract on which the action is founded; and secondly, that the plea must be accompanied by a payment into Court." The learned Judge also refers to the English Rules, similar to our own Rule 131, by which it is provided that with a defence setting up a tender before action the sum of money alleged to be tendered must be brought into Court. Several cases are referred to by the learned Judge, which prove to be very interesting, and to which I refer. In the course of his remarks the learned Judge further says: "But where no actual offer of money is made, and advantage is not taken of the opportunity afforded by Order 22, Rules 1 and 3, to make payment into Court, I think the Court ought to be satisfied of the existence of that continued readiness to pay, which both at law and in equity are essential to the success of a plea of tender." And further he says: "It is well settled that the mere fact of a mortgagee claiming more than he is entitled to is not sufficient to deprive him of his costs," citing Hodges v. Croydon Canal Co., 3 Beav. 86, and In re Watts, 22 Ch. D. 5.

I take it that the plaintiff in a redemption action is submitted to the same requirements of the law concerning tender as a defendant in an action for foreclosure, and that therefore the plaintiff in this case was obliged not only to offer the money unconditionally but also to be always in readiness

to pay, besides bringing the money into Court. She having failed to meet any of the requirements of the law, I must make her pay the costs of her action, as well as of the counterclaim set up by the defendant asking that the property be sold. The counterclaim does not ask for foreclosure, as I believe it should. No objection was taken to the same, and, to settle all disputes between the parties, I order that the counterclaim be amended so as to permit me to order foreclosure.

The judgment will be, therefore, that the plaintiff be permitted to redeem, within 60 days, whatever remains of the said properties in good standing in the name of the defendant Strong, on her paying $750 and costs, with interest until paid; upon which the defendant Strong is ordered to reconvey the said properties to the plaintiff. And in default of the plaintiff so redeeming within the said delay it is ordered that her equity of redemption be foreclosed, and that the said claims so mortgaged and still remaining in good standing in the name of the defendant Strong, be sold; out of the proceeds of which he, Strong, will be paid the said sum of $750 with interest and costs, the remainder, if any, to be paid over to plaintiff.

YUKON TERRITORY.

DUGAS, J. SEPTEMBER 10TH, 1907.

CHAMBERS.

SCHWARTZ v. DAVISON.

Interpleader—Application by Sheriff for Order—Property Seized in Apparent Possession of Execution Debtor—Claim by Wife—Issue Directed—Onus on Claimant—Direction that she be Plaintiff.

Application by sheriff for an interpleader order.

R. L. Ashbaugh, for the sheriff.

George Black, for the plaintiff.

F. J. Stacpoole, for the claimant.

DUGAS, J.:—The sheriff, having in his hands a writ of fieri facias de bonis issued out of this Court against the goods and chattels of the defendant to satisfy the judgment in this case, seized certain articles described in an affidavit filed in support of the application which he now makes for an interpleader issue, the wife of the defendant, Margaret L. Davison, claiming the articles so seized as having been and being her property and in her possession. Amongst those articles there are 2,367 cords of wood, more or less, situate on the north fork of the Klondike river.

It appears that some person is doing the business of wood merchant in Dawson under the trading name of "The Dawson Wood Yard;" J. H. Davison, the defendant, acting and being to the world the manager thereof. This, besides, appears on the business cards and the heads of accounts used by the concern, shewn at the hearing by the claimant's counsel, Mr. Stacpoole.

The claimant swears that all the goods and chattels seized are her separate property, and she claims them as such. She alleges that the goods and chattels were purchased for use in her business of wood dealing, which business is her separate property; that the goods and chattels were paid for with money which also was her separate property, being her personal earnings and acquisitions from the proceeds and profits of her trade as wood dealer; that the goods and chattels were in her possession when seized—she further alleging that the horse and mare, police waggon, and set of double harness were, at the time of the seizure, rented by her for hire, and were seized when in use by the Yukon Consolidated Gold Fields Company, the hirers thereof.

No declaration, as required by sec. 4 of ch. 41 of the Consolidated Ordinances, is produced as having been registered, and the public is left completely in the dark as to who is really engaged in the business.

The plaintiff is a wood cutter and raftsman, and his claim is for 186½ days' work done in cutting wood for defendant from 8th September, 1906, to 21st April, 1907, at $7 per day; for the hire of horse, harness, and sleighs during the same time, for which he charges $2.50 per day, making $450 for this item; 2½ tons of hay at $100 a ton, making $250 for this item; 1½ tons of hay at $50 per ton, making $75 for this item; for the hire of a poling boat during 16 days at $1 a day, making $16; for the hire of a man and services of

himself cruising for wood on Klondike berth in September, 1905, 3 days, for which he charges $42; expenses at a road house for a Mrs. Bettens and himself at Gold Bottom in November, 1906, which is an item of $6, for stage fare for the same Mrs. Bettens $4; and paid to one Bettens for work on drive in September, 1906, $25; making in all $2,173.50 due in connection with the wood in question.

The defendant contested this action, and in his statement of claim I find that by paragraph 3 he says "that he did not request the plaintiff to do the alleged work," and then he goes on to say at paragraph 4 that "in the alternative the plaintiff did not do any of the alleged work." In paragraph 5, "in the further alternative, that the work was done so negligently and improperly that it was and is of very much less value to the defendant than if it had been properly performed, and the defendant has suffered damage by reason of such negligence and impropriety." Paragraph 6, "in the further alternative (he alleges) that the defendant did not do the work according to contract; that the plaintiff and defendant entered into a contract whereby the defendant agreed to give the plaintiff $6 per day for cutting and banking wood, and $1 per day extra by way of bonus, provided the plaintiff cut and banked the said wood for the same cost as if the defendant had the wood cut and banked by contract to be paid for by the cord," and he reiterates negligence. By paragraph 7, he denies having hired the said goods, and "that the plaintiff had agreed to give the defendant the use of horse, harness and sleighs during the season of 1906-1907, for the feed of said horse." He further states by paragraph 8 "that the plaintiff did not sell and deliver the goods mentioned, or any goods, to the defendant, as the hay mentioned was cut under a permit from the government to the defendant, and the defendant was to pay the cost of cutting and stacking the same." He denies that the plaintiff paid any money, or any part of it, or that he paid any such money for the defendant or at his request. Then he files a counterclaim by which he alleges that in the year 1904 the plaintiff entered into a contract with him to deliver at Dawson 2,500 cords of wood; that having had the wood delivered under such contract he had it measured and found 2,231 cords, for which he, the defendant, paid the plaintiff, but that on having the same remeasured it was found that only 2,161 cords had in fact been delivered, and

that he (the defendant) supplied 70 cords to make good such shortage. for which he paid $7.50 per cord, in all $525. That he (the defendant) has demanded payment of the plaintiff of the said sum of $525, but that the plaintiff has not paid it. He further alleges that the plaintiff agreed with the defendant to superintend the cutting and banking of 2,500 cords of wood during the winter season of 1906-1907 on the following terms: "That if the plaintiff so cut and banked the said wood at the same cost to the defendant as though the defendant had let a contract for said work, and the same to be paid for by the cord, the defendant would pay the plaintiff at the rate of $6 per cord and a bonus of $1 per day." Finally he realleges negligence, improper methods of working, and waste of time and material, and claims $2,500 damages.

On the day fixed for the trial the defendant was in Court, and without going to proof consented that judgment should be entered against him for $1,950 with costs, and that the counterclaim be dismissed also with costs.

Two deeds are produced shewing that in 1904 and 1905 the contract to cut wood was entered into between the plaintiff and the defendant.

Upon examination for discovery the claimant admits that during the last two years, until lately, she was absent from this Territory, claiming however the business as hers, and that it was started and continued with moneys that she had in 1900. To the world the defendant has always acted as if he had been the only party in the wood business. Part, if not all, of the wood seized is exactly the same lot upon which the plaintiff's claim is based.

I am asked to order an issue to have it decided as to who is proprietor, the defendant or the claimant, of the goods and chattels seized, and to declare upon whom should be put the onus of proving the said ownership. I may say that in ordering that issue I have no hesitation whatsoever to order that the claimant be made plaintiff, and further that I need not take the trouble of referring to any authority as to my right and duty to do so, being satisfied to remark that it would be hard to find a case where a claimant would have less justification in asking to be freed from making her pretensions good before the Court.

YUKON TERRITORY.

DUGAS, J. SEPTEMBER 10TH, 1907.

TRIAL.

MUNROE v. CAMERON.

Woodmen's Liens—Enforcement of Lien—Agreement to Give Time—Waiver—Condition.

Action to enforce a woodman's lien, etc.

J. K. Macrae, for plaintiff.

F. J. McDougal, for defendants.

DUGAS, J.:—The plaintiff had a writ issued, but only filed a claim for lien under the Woodmen's Lien for Wages Ordinance upon some timber, for services performed by him in hauling, banking, and piling the same, at the instance of the defendants, between 22nd April, 1907, and 23rd May, 1907; the amount claimed as due being $520.

I may say that the timber in question is composed of logs and fire-wood, and falls under the description of paragraph 1 of sec. 2 of the Ordinance. Part of this wood was at the mouth of the Indian River; part of it at 12 miles up from the mouth of the river; and the rest between the river and Dawson.

Out of this sum of $520, it is admitted that $219 is due for cash advanced and goods sold by the plaintiff to the defendants, leaving, therefore, $301 only for which a lien can be claimed.

It would appear that the raft in question was sent to Dawson upon the advice of the plaintiff, with the hope that some moneys would be obtained upon it which would help the defendants continuing the cutting of logs and timber and fulfilling their contract, which otherwise they could not do. The parties were very friendly, and there seems to have been a desire on the part of the plaintiff to help them out of their difficulty, and to that effect he (the plaintiff) was ready to wait for his money, but this was subject to an order given upon Joe Burke, manager of the Yukon saw mill, of Dawson, with whom the defendants had contracted.

Mr. Burke refused to accept the order, as previous claims had already been made against the defendants, and the plaintiff was asked to wait. In view of this refusal, the plaintiff considered himself entitled to secure his claim upon the raft of timber or the wood in question, more particularly as, this security being refused, he was exposed to lose his recourse by waiting too long in filing his lien and taking his action within the delays fixed by law.

Although the defendants did not expect the plaintiff to take such a recourse, there is no doubt that if he (the plaintiff) consented to some delay it was upon the representation that the order would be accepted. He never waived his right to a lien. The order on Mr. Burke not being accepted, he was justified in taking proceedings to protect himself, more particularly considering that the defendants were in difficult circumstances.

The lien upon the timber seized is therefore declared to exist to secure the amount of $301, and it is ordered that the same be sold after 10 days from this date to satisfy the said sum and all costs incurred in this matter, unless the said sum and costs be sooner paid. The plaintiff will be left, as to the unpaid balance of his claim, to any other recourse he may choose.

YUKON TERRITORY.

CRAIG, J. SEPTEMBER 12TH, 1907.

TRIAL.

BANNERMAN v. DETROIT YUKON MINING CO.

Contract—Work and Labour—Building Ditch to Carry Water to Defendants' Mining Property—Time of Completion—Delay—Waiver—Extra Work—Acceptance—Payment—Tender—Counterclaim—Damages—Accounts—Reference—Costs.

Action for the contract price of work done for defendants and for extras, and counterclaim for damages, etc.

George Black, for plaintiff.

F. J. McDougal, for defendants.

CRAIG, J.:—The defendants are the owners of certain hydraulic mining properties in the Yukon Territory, and contracted with the plaintiff for the building of a ditch, by an agreement dated 10th August, 1905. By that agreement the plaintiff was to construct a ditch to carry water to the defendants' property, the length being approximately 8 miles, as laid out by a plan and blue print referred to in the contract. The blue print is produced and admitted as being the one referred to, although not marked by the parties at the time of the signing of the contract. The contract provides, among other things, for the commencement and termination of the ditch, the stripping of the right of way of material on the top, and the proper packing of the lower side of the ditch, for the construction of the ditch, and the removal of loose rocks, roots, stumps, so as to leave the bottom of the ditch smooth and solid, and for the puddling and tamping of the ditch during construction, where necessary to prevent leakage after completion. Part of the work is ditching in the earth and part fluming over certain points indicated in the blue print. The contract gives some diagrams shewing the slope of the ditch, depth and width, and also the nature of the flume and the supports for it. Along part of the ditch or the watercourse the contract provides for putting in siphons to carry the water over gulches and draws for the support of these siphons, the company to furnish all necessary pipe and piping for the siphons, but the plaintiff to lay them. The contract provides for the weighing down of the siphons and for the elevation of the siphons, and where so elevated to be supported by live timbers, and for the elevation of the siphons in crossing gulches for drainage purposes, and where so elevated to be supported in the manner approved and provided for in the contract. The contract provides for the delivery of the lumber which the company provide for all flumes. The work is to be commenced under the contract on 15th August and completed by 30th September, 1905. A special clause in the contract provides for the work to be done subject to the inspection and approval of the company, who will keep a representative on the ground. Payment is to be made at the rate of $2,350 per mile, except for a certain portion which had been previously done by the company in part, the plaintiff to take over that part and to allow the defendant company $1,406.25 for the work they had done. This is an admitted modifica-

tion of the contract, and the only other modification in writing is by a letter dated 23rd August, which provides for certain logging to be done. Neither of these two modifications will enter into the consideration of this case so far as the amount to be paid under them is concerned; but the letter of 23rd August will be considered later on when deciding upon a certain extra asked for by the plaintiff. The plaintiff proceeded with the work, but did not complete it by 30th September. He continued to work on until about 23rd October, when he says "he quit on account of the cold." There is no doubt that the defendant company allowed him to continue after 30th September, in the hope that he would be able to complete the ditch for the next season's operations. A question arises as to whether the defendants waived any of their rights under the contract and extended the time for completion beyond the fall. At the time the plaintiff quitted work in the fall, I am satisfied from the evidence that the work was not all completed by him, that many of the connections between the ends of the flumes and the ditches were not made, that no puddling whatever was done, that in the ditch there remained many pieces of rock which should have been removed under the contract, that tamping was not done, and that the siphons were not connected. The plaintiff seeks to excuse his non-performance of the work, saying that lack of water prevented the puddling, that delay in supplying pipe by the defendant company hindered his work, that extra work prevented him, and that the cold intervened. As to the lack of water for puddling, that is no excuse. His contract provided for puddling, very little water was needed, and I am satisfied from the evidence that water could have been had from seepage and other sources sufficient to puddle. In any case that was not the fault of the defendant company. He contracted to puddle, and it is not such a lack as can be excused in the non-performance of his contract. It was his business to see that he had water to puddle the ditch as he proceeded. The tamping also should have been done, the rocks should have been removed, and I am doubtful as to whether any delay or neglect on the part of the defendants prevented the performance of the work by the plaintiff. He says he was not furnished with certain angles, and I will deal with that later on when considering the extras. The cold weather certainly was no excuse, because the period for the performance of the work expired

long before the cold weather set in. The doing of extra work for the company is not an excuse either, and cannot justify the non-performance of the work, because he voluntarily took upon himself the performance of the extra work, and should have provided extra men to do it, and no extension of time was given by the defendant company by reason of the extra work being imposed upon him. In fact this extra work was an entirely separate and independent contract.

The defendant company paid the plaintiff in the fall certain sums of money in excess of the amount to which he was entitled, and allowed him to go on the following spring, and here a contest arises as to what the arrangement really was. I think there is no doubt the defendant company acquiesced in his continuing the work in the fall beyond the period given by the contract. What they now say is that they agreed to allow him to continue, to finish his contract in the spring, provided he had water running by 1st May or when the water was available in this country for hydraulic operations. Bannerman says, on the contrary, that he was allowed to go on and take his own time, to finish when practicable. I think Bannerman's contention in this respect is unreasonable. I think it is unreasonable from the nature of the contract and from the terms of the contract. The work was to be completed in the fall of the previous year, the very evident intention of the company being to use the water at the earliest available moment in the succeeding year, and they only allowed Bannerman to continue in the hope that he would have the water running at the very earliest moment. In this country it is well known, and it appears by the evidence, that the best run of water is in the early spring on the melting of the snows, and all operators seek to get that water. That was the clear intention of the company. During the summer of 1905 and until October of that year Mr. Hargreaves was manager of the defendant company, but it was understood that Mr. Brenner, a director of the company, who was on the ground, and one Bartholomew, an employee of the company, should supervise the work on the ditch.

As I view the contract and the arrangements made, any modification or alteration of the contract should have been agreed to between Bannerman and Hargreaves, the manager, but that Brenner and Bartholomew, on the ground, had the

right to say whether the work conformed to the contract or not, and there their authority ended, unless Bannerman can shew that, by direction and consent of Hargreaves, Brenner made some modification. After Hargreaves left in the fall of 1905 it is admitted that Brenner assumed control and management and represented the company, and anything which he would do would bind the company until the arrival of Mr. Rothschilds, who took Hargreaves's place and became the manager. In the spring of 1906 there certainly was an interview between Bannerman, Brenner, and Rothschilds, and Bannerman was permitted to go on, and I see no reason to doubt the statement of Rochschilds and Brenner, that he was permitted to go on to finish his contract because that was the easiest way to get rid of the difficulty and to expedite the work, but he was to expedite the work with all diligence, and to complete it.

It is unfortunate in this case that on the main point in dispute the evidence is so indefinite and uncertain that it is very hard to say in how far Bannerman failed exactly to complete his contract within its terms, and how much the defendants had to supply to make good his default. I am satisfied that no puddling was done by Bannerman, that certain rocks were not removed by him in the ditch, that certain connections were never made by him between the ends of the flumes and the ditch, and tamping was not done. He had only from 10th August to 30th September to complete his contract. Mr. Brenner in his evidence says that it would take from 3 to 4 months to properly puddle a ditch; that it requires constant attention even after it is built to keep it up. I would therefore infer from the evidence of Brenner in this regard that the puddling which Bannerman was to do was such puddling as would make the ditch sufficient to carry water for a limited period, that is, to create a ditch and make it at the time of creation a carrying ditch, not so that it would resist all inroads of weather and accident afterwards, nor would he be supposed to guard against things which might arise or defects which might be found along the ditch caused either by accident or the nature of the ground. He did not even do that much, in my opinion. He says the ditch was accepted and taken off his hands, and that the company were satisfied, and, to justify him in saying so, evidence is given of a meeting between Bannerman, Rothschilds and Brenner at the office of the defendant com-

pany, to which Bannerman was invited by the defendant company. At that meeting Bannerman asked for a settlement. Rothschilds, in Brenner's presence, prepared a statement—exhibit E—which starts out with the actual mileage done and adds two other items, making a total of $1,927.47. In addition to the mileage, as provided for by the contract, a sum was added for hauling pipe and making a penstock, and another small item which I have forgotten, of $14.13. This total sum Rothschilds tendered to Bannerman as a settlement. Bannerman then claimed certain other extras, which Rothschilds refused to pay. Rothschilds and Brenner both swear that this was offered as a settlement of all claims between the parties, and that the tender of $1,927.47 was without prejudice to any claims which the defendants might have for damages for non-performance. Bannerman, on the contrary, says that it was offered to him as a payment for the work which he had done under the contract. Rothschilds and Brenner both say that Bannerman had no right to carry away this paper or any paper on which certain figuring was done by them, and that he picked it up and carried it away to use as evidence against them, and refused afterwards to hand it back. It is certain that the papers were produced from Bannerman's possession, however he acquired them, and I am inclined to think he did pick them up after the dispute arose over the extras and carried them away with intent to use them as he has used them. I am also convinced that if Bannerman had accepted the amount offered, there would not have been any question of extras raised by the company, and I do not think that Mr. Rothschild, at least, anticipated that there would be any extras claimed by Bannerman. The parties were unable to settle, and Bannerman afterwards and before action claimed a long list of extras, bringing up his total claim to about $2,847.

The company by their counterclaim raise the question of damages and claim $3,953, a very large sum, it will be seen, to raise by way of counterclaim now, which they did not raise at the time they offered a cheque to Bannerman. At the trial no books were produced shewing any entries of any of these items of counterclaim by the company. They say all their books were kept in Detroit, but I cannot understand how there should not be some books of original entry here, where they claim for the work of men, lumber, moneys paid, etc., which they now seek to charge against Bannerman.

Bannerman has no books or original entry for his extras, but he says these books were lost in a flood when he was crossing some overflow in a buggy. He does not say very clearly how they were lost, but he does say they were lost in a flood out of his pocket.

Starting with the claim, Bannerman is entitled to the first item in his claim, namely, $1,874.90, admitted by the company to be earned, subject to their counterclaim. Coming next to Bannerman's claim for extras, the first item is, "To hauling materials, $52.57." Brenner denies giving any authority for this work, but, in reading over Brenner's evidence and the evidence of Hargreaves, I find that there was some discussion about the hauling of material and supplying material for this very item, and I think the preponderance of evidence is in Bannerman's favour. The defendants did supply extra material after a consultation, and the same relates to item number 6; so that both those items will be allowed. The next item is, "Labour and material for extra fluming, $250." This item I will disallow, for the following reasons. I am satisfied from the evidence that at the point where the extra fluming is claimed at No. 6 Pup, the survey shewed an alternate route. Bannerman went on and dug a trench for a siphon, and the manager for the company—Mr. Brenner—determined to take the other course instead of crossing the gulch by siphon, and paid Bannerman $140 in full for the work thrown away at this point. Nothing whatever is arranged or settled as to any extras at this point for fluming, and Bannerman goes on and puts it in. I think there was indication enough on the plan and on the ground to lead him to suppose that that work might be called for under the contract, and in any case I am not satisfied from the evidence, and Bannerman has failed to prove to my satisfaction, that fluming costs any more than ditching; and that item will not be allowed. As to extra labour putting in trestle at No. 23, item No. 5, the evidence is very conflicting, Bannerman asserting that the company failed to supply him with proper angles and pipes to carry these siphons over, and that the angle supplied necessitated his raising the pipe at a more acute angle and therefore having to support the pipe upon a trestle. He procured a plan shewing quite an elaborate piece of work here, requiring heavy timbers to support the pipe. Bannerman says that Brenner authorized this work. This, of course, was done

during the period when Brenner was manager after Hargreaves had left, and Brenner would therefore have authority to authorize it if he did authorize it. The work was very evident on the ground. Brenner certainly was there while the work was proceeding. It cost extra, and no protest was raised by Brenner as to Bannerman proceeding in that way, and the witness Bailey confirms Bannerman to some extent in his contention. I therefore have the evidence of Bannerman, the evidence of Bailey for what it is worth, and the fact that the work was done, that Brenner knew of it, and it is expensive work and extensive work which one would naturally think Bannerman would expect to get paid for, and Brenner could not reasonably expect that Bannerman would go on with this work without being paid for it, and he made no objection to the work being done. I am inclined to think the angles were not supplied; otherwise I cannot see why Bannerman should have unnecessarily added to his own labours and delayed the completion of the contract by taking this extra work on himself. I think, therefore, he ought to be allowed this item. The evidence does not satisfy me that he is entitled to any other item of his extras except the timber for siphons at 23, $100 and $50. There will be allowed altogther for this work $100 and $228. As to the item No. 7—"one-half amount paid by plaintiff for engineering expenses—" this will be disallowed. The evidence is that Bannerman demanded that the company should supply him with an engineer who would put in or renew the grade stakes which had already been put in, but which, it seems, Bannerman had knocked down in the course of his operations with his ploughs and shovels. He insisted that the company should keep up those grade stakes. After some negotiations Hargreaves proposed that if Bannerman would supply the bondsmen which he had promised to give for his performance of the contract, and would take a certain contract of lagging at 50 cents, he (Hargreaves) would pay this item of engineer. It is not provided in the contract that Bannerman should provide bondsmen, but it is admitted that bondsmen were to be given which never were given. Bannerman failed to give the bondsmen, and he would not take the contract at the specified figure, and from the evidence of Brenner and Hargreaves I am satisfied that the promise of the company to pay the engineer item was conditional absolutely upon Bannerman agreeing to give the bondsmen and to take the contract for the lag-

ging at 50 cents per foot. The company afterwards increased the price for the lagging by letter—exhibit L—which is as follows: "Under the arrangement entered into yesterday, Mr. Brenner acting for the company, you will be paid 62½ cents per lineal feet for lagging those portions of the ditch that we may desire to have lagged, the work to be done in an approved manner and subject to acceptance by us the same as other work covered by the contract entered into between us in August, 1905;" this was signed by Hargreaves for the company. This Bannerman says he accepted. There is no mention whatever of engineering fees, and I take it there was no promise to pay them, and no obligation on the part of the company to provide for this item.

Next, taking up the extras claimed by the company, they now abandon the first 4 items of their counterclaim, namely, Janeau, Riper, Jones, and Woodworth sums. As to the balance, the main portion is made up of wages paid to men working on the ditch, as it is alleged, and the only evidence which can be called evidence at all, of those expenditures, are vouchers put in of moneys paid for work on the Hunker ditch, but the vouchers are only evidence that the company did pay certain sums, if they are evidence of that. The particular men who were paid are not connected in any way with any specific work on the ditch which Bannerman neglected to do. In a general way Mr. Brenner gives evidence that those sums were spent in making good Bannerman's default, but, when the evidence is sifted, and some of the men are called to prove these accounts, it appears that they were engaged partly in repairing defects in the ditch and partly in doing other work not at all connected with these defects in the ditch. So that I cannot tell now exactly how much of the money spent in this way was applied to make good Bannerman's defaults, but some of it was, I am quite satisfied. I have endeavoured to approximate as nearly as I can what would be a reasonable sum to allow for this, and if the parties are content to allow the sum of $250 to be applied in that manner, it will go at that; otherwise there will be a reference to the clerk of the Court to take an account of what work was actually done by the company in making good the following defaults: the puddling of the ditch, that is, such puddling as would make the ditch carry water in the first instance, nothing to be allowed for puddling or permanent work on the ditch: making good defects which

arise by the nature of the ground which are discovered or which happen after a first puddling. It is very hard to make clear what should be done. There is certain work which always must be done upon all ditches, and which must continue to be done as long as the ditch is in use. The extent of this work, of course, depends upon the nature of the ditch and the nature of the ground and so on, but I am quite satisfied that the company cannot expect Bannerman to keep their ditch in good shape as long as they require to use it; all that he is required to do is to make the ditch and make it reasonably capable of carrying water when completed, and as it would have carried water on 30th September, 1905, if puddled then. There will, however, be an account taken of what it would cost to remove stones and other obstructions in the course of the ditch and also for the tamping and connection of the flumes with the ditch.

I am strongly of the opinion that it would be very advisable for the parties to take the sum which I have fixed as a settlement of this matter. The investigation will necessarily be a long and a tedious one, and it will be hard to arrive at a determination of the actual amount which should be allowed. In taking this account there will be excluded from it the part of the ditch which one Burke took over by the consent of the company which he was to put in shape to carry water for himself. I will also disallow the sum of $140 charged as paid to Rufus Buck for engineering. There is no liability on Bannerman's part to pay that sum. I think it was merely an afterthought of the company, and was put in as a counterblast to his charges for extras. I will also disallow the item of $500 for fluming, there being no evidence to satisfy me as to the necessity of this extra work and that it was caused by Bannerman's default. The company saw fit to put in new pieces of fluming or to add fluming over bad pieces of ground or other places, and I do not see why they should now charge Bannerman with it. In any case there is no evidence to shew the points at which this work was done, the quantity of lumber supplied at the several points, and the need for it, and I will disallow that item.

The defendant company raised the objection that the plaintiff has claimed a waiver by the company, but has not pleaded waiver. While there is no specific allegation of waiver in the statement of claim, yet there is sufficient indi-

cation that the plaintiff intended to rely upon waiver, and all the evidence of waiver went in at the trial without objection. I will, therefore, allow an amendment, if needed, to raise that plea. Upon the question of waiver I may just say this, in addition to what I have already said, that I am satisfied that the company at the time they offered Bannerman a cheque in settlement did not anticipate any claim for extras, and that they were glad to get rid of him and get him off their hands in that way, but not that they had waived by that tender any rights which they might have to set up default on Bannerman's part. I think the tender was one, as we would say, without prejudice, and offered for the purpose of settlement, and one reason why I think so is this, that during the progress of the contract there were other extras which were settled at the time and paid for by cheque promptly, and the company or its manager might very well have thought that no extras could arise or were intended to be claimed, when he knew that such previous extras had been settled for, as I have stated. The judgment will be based upon the above findings, and, no money being paid into Court, the defendants will pay the main costs of the action. The defendants will be allowed to set off the costs of counterclaim, and of the following witnesses, Buck, Burke, McDonald, Smith on rebuttal; and the counsel fee will be fixed with reference to this allowance for counterclaim.

YUKON TERRITORY.

CRAIG, J. SEPTEMBER 17TH, 1907.

CHAMBERS.

BARRETT v. CANADIAN BANK OF COMMERCE.

Evidence—Foreign Commission—Application for—Examination of Witness abroad—Affidavit—Nature of Evidence Sought—Abandonment of Part of Case—Dispensing with Evidence—Reserving Right to Apply at Trial.

Motion by the defendants the Canadian Bank of Commerce for an order for the issue of a commission to examine

one Wills, who was travelling in Europe, at Paris or elsewhere.

F. J. Stacpoole, for applicants.

F. T. Congdon, K.C., for defendants the Syndicat Lyonnais du Klondike.

J. B. Pattullo, for plaintiff.

CRAIG, J.:—The affidavit of Mr. Cameron, manager of the bank, discloses that Wills was at one time manager of the bank at Dawson, and is the only person who can answer certain allegations, particularly allegations of misrepresentation and fraud, set up in the statement of claim and joinder in relation to a certain document of hypothecation signed by Barrett in favour of the bank.

On the hearing of the motion I suggested that owing to the uncertainty of Mr. Wills's movements and the consequent delay of the trial, it might be well to go on with the trial, and, if it appeared upon the trial that anything was alleged which only Mr. Wills could answer, that the hearing might be adjourned until his evidence was obtained, either by commission or by his coming into the country.

It is further alleged that Mr. Wills is the only person who can give other evidence, but in the affidavit setting out the evidence which he can give, such evidence is not particularized, as I think is required by the authorities, and the nature of the evidence which he is expected to give, apart from the answers to the direct allegations of misrepresentation and fraud, is not shewn. I think that statement is too general to warrant the issue of a commission, and that particularly when the delay of the trial would be so great and the uncertainty of the place of residence of the witness to be examined is so great, the commission should not issue.

Since the hearing of the motion I have received a letter from the solicitors for the plaintiff stating that rather than delay the trial they will abandon all the allegations in paragraph 15 (a) of the amended statement of claim and in paragraphs 5 and 6 of the amended joinder or reply. The solicitor for the bank replies that the allegations are repeated in paragraph 2 of the reply of the bank to the statement of defence, and that Wills's evidence is of importance not only in respect of those paragraphs, but also in respect of the business transactions between the plaintiff Barrett and the

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cannot go on. Therefore, the costs cannot depend upon
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Ordinarily the costs of the motion would have depended on
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this matter to me now.

YUKON TERRITORY.

AS, J. SEPTEMBER 18TH, 1907.

CHAMBERS.

RE FULLER AND CUTHBERT.

Landlord and Tenant—Overholding Tenant—Summary Procedure for Ejectment—Mesne Profits—Costs.

Application by Newman A. Fuller (landlord) under
477 of the Judicature Ordinance for a summary order

bank, which transactions were evidenced by the notes, cheques, and documents produced on the examination of Barrett. The only specific allegations before me as to the evidence which Wills can give are that he can answer certain statements in the pleadings. All these statements except the one mentioned—the letter of Mr. Stacpoole—are now abandoned; and the order will be that if all these allegations of fraud and misrepresentation or any other statements which only Mr. Wills can answer are abandoned and stricken from the pleadings, then the commission will not go, reserving always to the bank the right to move for a commission or postponement of the trial if it appears upon the trial that the evidence of Wills is absolutely necessary to answer the plaintiff's case, and that only he can answer it. If any account is required to be taken then, of course, the same ruling will apply. If it appears that his evidence is necessary to be taken upon any account ordered, the defendant bank may then move again for such evidence to be procured.

The costs of this motion will be costs in the cause.

YUKON TERRITORY.

CRAIG, J. SEPTEMBER 17TH, 1907.

CHAMBERS.

CANADIAN BANK OF COMMERCE v. SYNDICAT LYONNAIS DU KLONDIKE AND BARRETT.

Costs—Motion to Set aside Judgment—Disposition of Costs.

Motion by defendant Barrett for an order disposing of costs of a former motion.

J. B. Pattullo, for defendant Barrett.

F. J. Stacpoole, for plaintiffs.

CRAIG, J.:—On 15th June last I gave a judgment (ante 424) setting aside judgment entered against the defendant Barrett in this case. The facts leading up to the conclusion and the reasons for setting aside that judgment are fully set out therein, and I do not need to repeat them here. By that judgment I provided that the costs should abide the result of a reference provided for in the original judgment. It will be remembered that by that judgment a reference was to

be had to ascertain the amount of the debt due by Barrett to the bank and to fix the difference between that debt and the amount due upon the promissory note made by the Syndicat Lyonnais, which note had been assigned to the bank as collateral by Barrett. There now exists no reason why that reference should go on; in fact, it is impossible that the reference should go on, and that the result of it should affect what it was originally intended to affect, namely, the payment over of the balance ascertained to the Syndicat upon their judgment against Barrett, because, as will appear by reference to the judgment of 15th June, the Privy Council reversed the judgment against Barrett on which the moneys, to be fixed by the reference, were to be applied. Both parties now admit that the reference is not necessary and cannot go on. Therefore, the costs cannot depend upon the result of that.

Ordinarily the costs of the motion would have depended on the merits of the motion itself, and that is how the matter stands now, and I have been asked to dispose of the costs. Viewing the facts as I did and as appears by that judgment of 15th June, and concluding that the judgment had been improperly entered and obtained, I see no reason for depriving the defendant Barrett of his costs of the motion, and I rely upon the reasons given in the case of Anlaby v. Prætorius, 20 Q. B. D. 764, and I order that the costs of the motion to set aside the judgment against Barrett, which costs I had reserved on 15th June, be now paid by the plaintiffs, the Bank of Commerce, that is, the costs up to the date of and including the motion to set aside, not the costs of re-mentioning this matter to me now.

YUKON TERRITORY.

DUGAS, J. SEPTEMBER 18TH, 1907.

CHAMBERS.

RE FULLER AND CUTHBERT.

Landlord and Tenant—Overholding Tenant—Summary Procedure for Ejectment—Mesne Profits—Costs.

Application by Newman A. Fuller (landlord) under sec. 477 of the Judicature Ordinance for a summary order

upon William J. Cuthbert (tenant) alleged to be overholding, for delivery up of possession of the demised premises, and for mesne profits.

C. W. C. Tabor, for plaintiff.

R. L. Ashbaugh, for defendant.

DUGAS, J.:—Cuthbert is an overholding tenant, and is prosecuted under sec. 477 of the Judicature Act. Besides asking for the ejectment, Fuller also demands the payment of mesne profits. The section does not go as far as that, and must be interpreted as it was in Allan v. Rogers, 13 U. C. R. 166, in which it was declared that "a landlord proceeding against an overholding tenant under 4 Wm. IV. ch. 1, sec. 53, cannot, under 14 & 15 Vict. ch. 114, sec. 12, recover mesne profits," the latter Act applying only to actions of ejectment.

Upon the material before me I believe that Fuller is entitled only to a precept commanding the sheriff to place him, as landlord, in possession, if Cuthbert has not delivered possession within 5 days; and also to a writ to the sheriff commanding him to levy of the tenant's goods and chattels the costs of this present proceeding as taxed.

MANITOBA.

OCTOBER 8TH, 1907.

COURT OF APPEAL.

LACHAPPELLE v. LEMAY.

County Court—Two Dispute Notes Filed by Mistake—Second one Properly Struck out—Refusal to Amend first—Appeal—New Trial—Costs.

Appeal by defendant from the County Court of St. Norbert.

Plaintiff sued to recover $208, his fees for medical attendance upon the defendant for 34 days in the hospital at Dawson City, and at other times.

The defendant was personally served with the writ of summons on 31st May, 1906. He consulted a solicitor, who

prepared a dispute note setting up the pleas of never indebted and the Statute of Limitations. This dispute note was sworn to by the defendant on 2nd June.

The defendant, having ascertained from the County Court clerk that this dispute note had not been filed, personally prepared a dispute note setting up a plea of never indebted only, and filed it on 9th June. The solicitor forwarded the dispute note prepared by him, and it was received and apparently accepted and filed by the clerk on 16th June. The plaintiff went to trial without any knowledge of the dispute note filed on 9th June, while the defendant's counsel did not learn, until the trial, that any dispute note had been filed other than that filed by the solicitor on 16th June.

At the trial the County Court Judge struck out the dispute note filed on 16th June, and refused an application to amend the dispute note filed 9th June so as to set up the Statute of Limitations.

Judgment was entered for plaintiff for $208.

Defendant appealed against the decision of the Judge striking out the dispute note filed 16th June, and refusing to allow defendant leave to amend the dispute note filed 9th June, by pleading as one of his grounds of defence therein the Statute of Limitations, and from the verdict at the trial, and asked that a new trial of the action might be directed and that the defendant might be allowed to plead and rely upon the Statute of Limitations at such new trial.

R. G. Affleck, for defendant, appellant.

A. E. Philion, for plaintiff, respondent.

THE COURT (RICHARDS, PERDUE, and PHIPPEN, JJ.A.), held that the dispute note filed 16th June was irregular and was properly struck out, but granted a new trial; an amendment of the dispute note raising the Statute of Limitations to be allowed; defendant to pay plaintiff all costs to date, including the costs of the trial and of the commission issued to Dawson City by plaintiff and of this appeal, to be paid within 10 days after taxation; otherwise the appeal to be dismissed with costs and judgment to stand. All costs to be taxed by the registrar.

MANITOBA.

MATHERS, J. OCTOBER 18TH, 1907.

TRIAL.

CARR v. CANADIAN NORTHERN R. W. CO.

Railway—Land Required for Right of Way—Negotiations with Owner—Written Statement by Owner of Terms of Sale — Oral Intimation that Taking Possession would Mean Acceptance of Terms—Railway Company Taking Possession without Filing Plans and Book of Reference —Presumption that Terms Accepted — Completed Contract—Statute of Frauds — Part Performance — Specific Performance—Mandamus—Level Crossing.

Action for specific performance of an agreement, or for a mandamus to compel defendant to proceed to arbitration.

S. J. Rothwell and H. P. Blackwood, for plaintiff.

O. H. Clark, K.C., for defendants.

MATHERS, J.:—The plaintiff is the owner of the south-east quarter of section 28 in township 10, range 26, west of the first principal meridian, in the province of Manitoba.

This land is situate close to the town of Virden. Early in July, 1905, the defendant company had constructed their line of railway northward from Hartney to the southerly boundary of the plaintiff's land. It had apparently not been the original intention of the railway company to enter upon the plaintiff's land at all, but to terminate the railway just south thereof. It was, however, ultimately decided to build across the plaintiff's land and up to the right of way of the Canadian Pacific Railway.

On or about 9th July the company opened negotiations with the plaintiff, through their right of way agent, for the purpose of obtaining possession of the necessary land for the construction of their railway across his farm. The plaintiff refused to give possession until the terms of sale of the right of way were settled and determined. The plaintiff and the company's agent could not definitely agree upon all the terms, and finally the plaintiff handed to the agent a

written statement of the terms upon which he would sell and permit the defendants to take possession for the purpose of constructing their road. These terms, so far as necessary to state them here, were, first, that the company were to be responsible for damage for trespassing or straying cattle in consequence of their interfering with the fences; the company to put up proper railway fences in due course; the price for the land taken to be $125 per acre; the company to put in a level crossing when required to do so by the plaintiff at the point he should indicate; the defendants to pay damage for the crop then growing upon the land, and to pay the plaintiff's solicitors' costs in connection with the business, and finally that the whole matter be completed within two months of the time when possession was given, and interest at 6 per cent. to be paid after two months from the completion day.

At the time these terms were handed to defendants' right of way agent, the plaintiff notified him that if the defendants took possession of the land he would understand from that act that the company accepted and agreed to his terms. A few days after this, and without any further communication with the plaintiff, the company took possession, and proceeded to and did complete the construction of the railway across plaintiff's land, and it was not until some two weeks afterwards that the plaintiff became apprised, by the receipt of a letter from the right of way agent, that the company did not propose to abide by the terms stated. Considerable negotiation then took place, the plaintiff contending that the company, by taking possession, had accepted his terms and thereby made a binding agreement between them, and the defendants refusing to admit that such was the effect of their action. As the parties did not succeed in coming to any terms, this action was brought for specific performance of the agreement, or, in the alternative, for a mandamus to compel the defendants to proceed to settle the compensation coming to the plaintiff under the terms of the Railway Act.

At the time the company took possession they had not filed the plans and book of reference required by the Railway Act. It is reasonably clear, I think, that if the company did not enter pursuant to an agreement made with the plaintiff, they were trespassers: MacMurchy & Denison's Railway Act, p. 213; Sandon v. White, 35 S. C. R. 309; Wicher v. Canadian Pacific R. W. Co., 16 Man. L. R. 343, 5 W. L. R. 44; Mason v. South Norfolk R. W. Co., 19 O. R. 132. It

will not be assumed that the defendants meant to commit a trespass; but it will be assumed that the company, having entered into possession of the plaintiff's land, knowing that he would interpret that act as an acceptance of the written terms of sale delivered to the right of way agent, meant to thereby consummate a contract with the plaintiff on those terms.

An offer may be accepted by an act or by conduct. An acceptance is consummated when it is made in a manner prescribed or indicated by the offerer: Anson on Contracts, p. 30. "I suppose there can be doubt that when a person, in an offer made by him to another person, expressly or impliedly intimates a particular mode of acceptance as sufficient to make the bargain binding, it is only necessary for the other person to whom such offer is made to follow the indicated mode of acceptance:" per Bowen, L.J., in Carlill v. Carbolic Smoke Ball Co., [1893] 1 Q. B. 265.

I must, therefore, hold that the company, by taking possession of the plaintiff's land, accepted the plaintiff's offer and thereby became bound by a contract in the terms of that offer.

It was contended on behalf of the defendants that, even if the taking possession did consummate a contract, the Statute of Frauds was a bar to the plaintiff's action, because the contract was not in writing; that the act of defendants in taking possession could not be referable to the contract, because it required the taking of possession to bring the contract into existence; and consequently there was no such part performance as took the case out of the statute. The company did take possession and have ever since continued in possession of this land. If the defendants' argument were carried to its logical conclusion, the plaintiff could never succeed on this contract as against the defendants, because, although the company had possession of his land, and had agreed with him to comply with his terms, yet he could never sue them because the contract was not in writing and there was no such part performance as would take the case out of the Statute of Frauds. I cannot accede to this argument. The contract has been partly executed on the plaintiff's part by permitting the defendants to take possession. It has also been partly executed on the defendants' part, as they have taken possession and occupied the land. Their doing so can only be referable to a contract. I think, therefore, that the plaintiff is

entitled to succeed on this branch of his case, and it only remains to determine the amount he is entitled to recover.

The quantity of land taken, .89 of an acre, at $125 an acre, would be $111.25. The defendants took possession on 13th July. They were to pay interest after two months from that date. Interest from 13th September to the commencement of the action would be $2.40. The plaintiff's crop damage was $16.20, but he was only entitled to one-third of the crop, a tenant being entitled to two-thirds. The plaintiff's one-third would be $5.40. The damage to a cow from defective fencing, $3, is not covered by the contract, and cannot be recovered. Solicitors' costs incurred by the plaintiff in connection with the business, $16.97. Total, $136.02.

As to the last item, it was argued that when the contract was made there were no solicitors' costs, and therefore none can be recovered. The solicitors' costs referred to in the offer are the costs incurred by the plaintiff in carrying out the contract, and there was evidence that the amount claimed had been so incurred.

Before the commencement of the action the plaintiff notified the defendants that he wanted the level crossing placed at the extreme north end of their line, adjoining the Canadian Pacific Railway Company's right of way. The company have fenced, and there is no complaint on that score. They have not, however, supplied the level crossing. The plaintiff is entitled to a declaration of his right to a level crossing at the point indicated.

There will be judgment for the plaintiff for $136.02 and interest since beginning action, and an order directing the defendants to construct a level crossing at the point indicated, and costs of suit.

If a contract had not been made between the parties, I am of opinion that the plaintiff would have been entitled to the alternative relief claimed, by way of mandamus to compel the defendants to proceed to have the compensation determined under the provisions of the Railway Act. That this relief may be obtained by action is sufficiently established by such cases as Morgan v. Metropolitan R. W. Co., L. R. 3 C. P. 553, affirmed, L. R. 4 C. P. 97, and Guest v. Poole Bournemouth R. W. Co., L. R. 5 C. P. 553. The prerogative writ of mandamus was applied for summarily, and it was to this prerogative writ that Moss, J.A., referred in City of Kingston v. Kingston, etc., R. W. Co., 25 A. R. 462, when he expressed the opinion that it ought to be invoked by motion,

and doubted if it could be awarded in an action. Under King's Bench Rule 879, it would appear that the normal mode of procedure for a mandamus is now by action.

MANITOBA.

MACDONALD, J. OCTOBER 21ST, 1907.

TRIAL.

YOUNG v. YOUNG.

Trust—Action to Enforce—Purchase of Land by Father—Alleged Trust for Son—Action to Compel Conveyance—Counterclaim.

Action by Andrew Young against George Young and John Clark to compel the re-conveyance of certain land. Counterclaim by defendant Young for moneys advanced to plaintiff.

S. H. McKay, for plaintiff.

G. R. Coldwell, K.C., and H. E. Henderson, for defendants.

MACDONALD, J.:—The plaintiff is the son of the defendant Young, and until the year 1896 both resided in Ontario, the son engaging in business without success, and the father had up to that time assisted his son by advances in money and otherwise. In that year the son came to Manitoba, and purchased the south half of section 14, and the west half of section 15 in township 11, range 21, west.

The south-west quarter of 14 he purchased in the name of his wife, Maggie Young. The south-east quarter he bought in his own name. He also purchased in his wife's name the north-east quarter of section 10 in the same township. At the time of the purchase of the properties his wife had not come to Manitoba, and the purchasing in her name was for the purpose and with the object of inducing her to come to Manitoba. She did come to Manitoba, and remained but a short time, when she left her husband and returned to Ontario. In the fall of 1897

the plaintiff sold out his live stock, and also returned to Ontario, and while there became involved in litigation with his wife and her people, and spent the most, if not all, of his money, again receiving financial aid from his father.

In March, 1898, the plaintiff was desirous of returning to Manitoba, but was so financially embarrassed that he could not, without assistance, carry on the farming operations, and appealed to his father for assistance, when the father agreed to advance further moneys and to purchase horses, stock, and implements required to work the lands and to furnish the seed and other things necessary for that purpose.

The father places the indebtedness then incurred at about $1,000; the son alleges that a statement was made out at the time, and that the amount was $918, but, as this indebtedness, as stated by his counsel, is not of much moment to the father, the amount can be placed at the latter figure.

At the time of this advance an agreement was entered into between them by which the son assigned to his father his interest in the lands described, with a provision for redemption on repayment by the son of the amount of the indebtedness. The son then returned to Manitoba and resumed the farming of the lands referred to.

The plaintiff made default under the agreement with Ezekiel Evans for the purchase of the south-west quarter of section 14. He also made default under his agreement of purchase from Mr. Kirchhoffer of the north-east quarter of section 10, the latter being the quarter upon which his dwelling and other buildings were erected, and was also unable to carry out the purchase of the south-east quarter of section 14.

In April, 1899, the father came up from Ontario to straighten out his son's affairs, and it is over the business as then transacted that the difficulties resulting in this action arose.

The father arranged with Mr. Kirchhoffer for the redemption of the north-east quarter of section 10, and procured a quit claim deed of it from his son, and then got title in his own name, paying all arrears, amounting to $250, and it was agreed at the time that the father was securing this quarter section for the son, and on repayment of the $250 by the latter the property was to be conveyed to him; this money was repaid two years afterwards, and a deed of the property made out to the son. The latter always re-

mained in possession of this quarter section. He also cultivated the south half of section 14 until November, 1900, when the father made a lease of it to one James Smith, and, since that date, the father has exercised overt acts of ownership over it.

The son now contends that the south half of section 14 was secured by his father for him, and that upon repayment by him of the moneys advanced by his father the land was to be reconveyed to him, and alleges that the purchase money was advanced on the terms of the agreement. This the father denies, and sets up that the son was unable to carry out his agreements for the purchase of this half section, and was not in a position to hold so much land, and that he was buying this land as an investment for himself, and that the son had nothing to do with it. To secure the moneys for the purchase of this land the father disposed of certain lands owned by him in Indian Head.

The agreement cannot be made applicable to the moneys advanced by the father on securing these lands. Such advances were not in contemplation of the parties at the time, and that agreement was entered into for the specific purpose of securing the moneys agreed to be advanced at the time.

The only agreement made at the time the father secured titles was with reference to the north-east quarter of section 10. It is not contended by the son that there was any agreement with respect to the repayment of the moneys advanced for the purchase of the south half of 14. The father paid out large amounts for this land, took absolute control of it in 1900, and not until he makes sale of it in 1906 to his co-defendant Clark, does the son assert the position which he now takes.

In 1903 the son intimated to his father that he would like to buy the south-west quarter of section 14, and on that occasion the father told him that he could not sell this quarter, as he would not then be able to rent the other quarter.

In 1906 the father wrote the son intimating that he would sell the south half of 14 to John Clark, and in reply received a letter, exhibit 15. In this letter the son refers to the farm as his father's, and asks for the first chance to buy. The tone of this letter throughout is entirely inconsistent with the rights now asserted by the son.

I find that the land in question, that is, the south half of section 14, was purchased by the father in his own exclu-

sive right and not for the benefit of the plaintiff, and I dismiss the action, as against both defendants, with costs.

The defendant Young is entitled to succeed on his counterclaim with costs, and I refer it to the local Master at Brandon to take accounts and ascertain the amount due to the defendant Young, and I reserve the question of costs of such reference and further directions.

MANITOBA.

SEPTEMBER 24TH, 1906.

COURT OF APPEAL.

REX v. GROBB.

Criminal Law—Issue as to Sanity of Prisoner Charged with Murder—Evidence of Physician—Improper Statement after Ruling of Trial Judge—Effect on Jury—Discharge.

Reserved case, stated by RICHARDS, J.A., pursuant to the provisions of sec. 743 of the Criminal Code:—

The prisoner was arraigned at the spring assizes at Portage la Prairie, on 14th March, 1906, upon an indictment for murder of one Clarkson, at Treherne, on 17th November, 1905.

Upon the application of prisoner's counsel, under the provisions of sec. 737 of the Criminal Code, I directed an issue to be tried as to whether the accused was, or was not, at the time of the arraignment, on account of insanity, unfit to take his trial, and a jury was accordingly impanelled to try this issue before the prisoner should plead to the indictment.

The evidence adduced was directly conflicting. Dr. Young, medical superintendent of the Selkirk Asylum, and Dr. James Patterson, of Winnipeg, testified that in their opinion the prisoner was insane, while Dr. Anderson, superintendent of the Brandon Asylum, Dr. Keele and Dr. Gordon, of Portage la Prairie, testified that they believed him to be sane. In the course of the trial upon the issue Dr. G. W. Staples, of Treherne, was called as a witness on behalf of the Crown.

He testified that he had had no special experience in insanity cases, and had not examined the prisoner as to his sanity. Counsel for the prisoner objected to the admissibility of his evidence, unless it were shewn: (1) that the witness was qualified to make, and had made, a personal examination of the prisoner as to his sanity; or (2) that the witness was qualified by education and experience to state, after a recital to him in Court of all the facts and circumstances surrounding the alleged crime, together with a full statement of the prisoner's pathological history, his family history, and the professional evidence as to prisoner's alleged delusions, as an expert opinion, whether or not he would conclude that the prisoner was sane or insane.

Upon this objection being taken, I ruled that, upon Dr. Staples's own evidence, no foundation had been laid to permit him to express an opinion as to the prisoner's sanity or insanity, and that his evidence or opinion upon this point was not admissible.

After my ruling, the witness (Dr. Staples), in reply to this question by counsel for the Crown, "What opportunities have you had during your acquaintanceship with the accused of being able to form an opinion as to his mental condition?" answered: "I have never been very intimately connected with the accused, although I have known him in a general sort of way for quite a number of years, and I never saw anything that suggested insanity to my knowledge. That is about all I can say."

Counsel for the prisoner thereupon moved for the discharge of the jury, upon the ground that, having heard the evidence which I had previously ruled to be inadmissible, the jury, as a presumption of law, would be bound to be prejudiced by it in arriving at their verdict, and that, therefore, this jury could not be said to have arrived at a fair and impartial verdict. I refused this motion, reserving the application for a stated case upon the point until after the verdict. Upon the issue going to the jury, a verdict was returned that the accused was not unfit by reason of insanity to take his trial.

Counsel for the prisoner then renewed his application for a reserved case, which application I granted, adjourning the trial of the accused until the then next assizes at Portage la Prairie.

The question for the opinion of the Court of Appeal is: Whether, under the circumstances above described, the jury

should or should not have been discharged, and a new jury impanelled to try the issue.

G. A. Stewart Potts and W. B. Towers, for the prisoner. Improper evidence having been heard by the jury upon a point material to the issue, it is a fair presumption that such evidence will have some weight in the consideration of the verdict. Therefore, the damage having been done, the jury should have been discharged and a fresh jury impanelled to try the issue de novo. This course is suggested by analogy to the case of the improper admission of a defective deposition where a new trial was ordered: Regina v. Hamilton (Man.), 2 Can. Crim. Cas. 390; improper admission of alleged confession even though the jury was subsequently instructed to disregard such evidence: Regina v. Sonyer (B. C.), 2 Can. Crim. Cas. 501; Russell on Crimes, 6th ed., vol. 3, p. 537, citing Regina v. Garner, 2 C. & K. 920; Regina v. Rose, 67 L. J. Q. B. 289; and the improper admission of evidence of similar offences: Makin v. Attorney-General, [1894] A. C. 57. And this is more particularly the case where the evidence being as here directly conflicting, a very small cirumstance might affect the result and thereby do a substantial injustice to the prisoner: Makin v. Attorney-General, supra. And no person can be adjudged a criminal except according to law, so that the safety of every person, whether accused or not, lies in repressing such looseness in criminal procedure: per Hunter, C.J. (B. C.), in Rex v. Williams, 2 W. L. R. 410. In any event, whether or not the Court of Appeal should decide that the procedure at the trial was correct, it is desirable that an opinion be expressed as to whether the same issue, viz., present insanity, is again open to the accused at the adjourned trial.

HOWELL, C.J.A.:—That issue will be open to you in the discretion of the trial Judge.

Potts:—That being the case, it is immaterial which way the question is answered, but we do not wish to be precluded from again trying the issue of insanity apart from that of the murder as charged.

E. Anderson for the Crown, was not called upon.

THE COURT (HOWELL, C.J.A., PERDUE and PHIPPEN, JJ.A.), held that the jury should not have been discharged.

MANITOBA.

MATHERS, J. OCTOBER 18TH, 1907.

TRIAL.

PONTON v. CITY OF WINNIPEG.

Assessment and Taxes—Tax Sale—City Corporation Becoming Purchaser—Agreement for Redemption—Resolution of Council—Specific Performance—Tender—Estoppel—Waiver of Forfeiture—Acts of Officers of Municipal Corporation—Notices—Court of Revision—Title—Real Property Act—Trust.

Action for specific performance of a contract.

A. C. Galt and G. D. Minty, for plaintiff.

I. Campbell, K.C., and T. A. Hunt, for defendants.

MATHERS, J.:—The plaintiff, a resident of Belleville, in the province of Ontario, sues for specific performance of an alleged agreement to convey certain lands situate in the city of Winnipeg, or in the alternative for a declaration that the defendants, the Corporation of the City of Winnipeg, hold the lands in trust for the plaintiff, subject to the payment of any taxes or other lawful charges which the defendants may have incurred in respect thereof, or a declaration that the plaintiff is the true owner of the said lands as against the defendants, and is entitled to redeem the same upon payment of taxes and lawful charges, or, in the further alternative, for damages for the loss of said lands.

The plaintiff and his father became mortgagees in 1881 to secure $2,000. Subsequently the plaintiff acquired his father's interest, and on 25th October, 1892, certificates of title were issued from the land titles office vesting the title in the plaintiff.

The land was assessed to the plaintiff, and he paid taxes thereon up to and including the year 1893, but no taxes were thereafter paid by the plaintiff or by any person else on his behalf, and in 1897 the lands were sold for taxes and bought in by the city of Winnipeg under the provisions of the Municipal Act. After the expiration of two years, the

lands not being redeemed, an application was made on behalf of the city to the land titles office for transmission of title, and the notice required in such cases was on 3rd November, 1900, served upon the plaintiff. This was the usual notice that the city had applied to be registered as owners under the Real Property Act of the land described, and that the district registrar had directed notice of the application to be served; that the applicants claimed title by virtue of a sale for taxes; and requiring the plaintiff to take notice that unless he redeemed under the provisions of the Asessment Act, or filed a caveat or took other proceedings to stop the issue of a title to the city within 6 months from the time of service, a certificate of title would issue to the applicants, or to whom they might appoint, and that the plaintiff would thereafter be estopped and debarred from asserting any claim to or in respect of the land. On the back of this notice was indorsed a synopsis of the Assessment Act, setting out, amongst other things, that any person having an interest in land which has been sold for taxes for more than two years, at any time up to the expiration of 6 months after being served with a notice issued by the district registrar, or at any time before the issue of the certificate of title to the tax purchaser, may redeem the land in which he may be interested by paying to the district registrar the amount required to redeem as shewn by the list returned to the district registrar by the treasurer, together with a bonus of 20 per cent. on the whole of said amount and the costs which the applicant was put to in proceeding to obtain a certificate of title, including his attorney's fees, if any, and that at the expiration of 6 months from the day of service of the last notice required to be served, the applicant, if the land be not redeemed in the manner provided, may apply to the district registrar, who, upon being satisfied that the purchaser has paid his purchase money in full for the land included in the application, would issue a certificate of title under the Real Property Act to the applicant, and thereafter no person except the tax purchaser or those claiming through or under him should be deemed to be rightly entitled to the land included in such certificate of title or any part thereof or interest therein or lien thereon, whose right thereon accrued or commenced to accrue prior to the issue of such certificate.

The certificate of title was not issued at the expiration of 6 months from the service of this notice, and the plaintiff

was assessed for the lands in 1901; and in November or October of that year the usual tax statement was sent to and received by the plaintiff. On 4th November, 1901, he wrote the following letter to the tax collector of the city:

"Belleville, Ont., Nov. 4, 1901.

"George H. Hadskiss,
"City Tax Collector,
"Winnipeg.

"Dear Sir:—I am in receipt of your tax bill for 1901 claiming taxes $41.20 for this year and $77.48 for 1899 and 1900, and also $8.97 percentage added.

"I understand from this that the lands are still assessed to me, and that I still have an opportunity of redeeming them. I had understood that the city of Winnipeg had purchased them, and that I had lost the opportunity of disposing of them and paying the arrears, which I had still hoped to do. Do you know of any pushing, reliable man in whose hands I could place this property with a view of disposing of it immediately even at a sacrifice? If so, will you kindly call his attention to the matter and oblige.

"Yours truly,
"Wm. N. Ponton."

This letter was turned over by the tax collector to the city treasurer, who under date of December 4th, 1901, replied as follows:—

"Wm. N. Ponton,
"Belleville,

"Dear Sir:—Re lots 1-88 bk. 8, 1-41 and 48-88 bk. 9, D.G. S. 43-44 St. John, Plan 192 (excepting those portions taken for right of way of C. P. R.)

"I regret delay in replying to yours of the 4th instant, which was caused by the absence of the assistant in the city solicitor's office who had the matter in hand. I now find the amount to redeem this property is $382.72. This amount may be remitted to W. E. Macara, district registrar, Winnipeg, who will issue the certificate of redemption.

"Respecting real estate agents, the following are the names of some of the leading citizens in that line." (Then follows the names of 6 real estate firms carrying on business in the city of Winnipeg.)

It appears that the plaintiff then communicated with some of the persons named in the treasurer's letter for the purpose of endeavouring to make a sale of the lands, but did nothing further in the way of redeeming them, and on 7th April, 1902, certificates of title were issued to the city by the district registrar.

The city assessment commissioner, following the practice adopted in his office, had closed his books as of 31st December, 1901, and all persons appearing to be the owners of property as of that date were placed by him on the assessment roll. The plaintiff was under the Assessment Act, the proper person to assess for the lands up to the time that the certificate of title was isued to the city. The lands were assessed to the plaintiff. On 3rd May, 1902, the assessment roll was completed, and on that day notice of assessment was sent to him. This assessment notice had the following statement printed at the bottom: "Take notice that you are assessed as above specified for the year 1902. If you deem yourself overcharged or otherwise improperly assessed, you, or your agent, may notify the assessment commissioner in writing of your wish to appeal within 14 days after this notice has been sent to you, and your complaint will be tried by the Court of Revision of the City of Winnipeg." No notice of appeal was sent by the plaintiff, and, in June or July following, the assessment roll was finally revised at the Court of Revision. On 28th November, 1902, the tax collector sent to the plaintiff the usual demand for taxes for 1902, amounting to $39.20. Upon this demand the following statement was printed:—

"The above taxes are due and payable forthwith to the undersigned. As an inducement for prompt payment 1 per cent. discount will be allowed off all taxes for 1902 paid on or before December 29th, 1902. Taxes for 1902 will not be received unless all arrears then due are paid. All lands in arrears for more than one year will be sold for taxes. The business tax must be paid before 31st December, 1902, or a distress warrant may be issued, and this may include all taxes due from any one who is liable for business tax. No cheques accepted unless marked 'good.' All cheques, drafts. etc., must include exchange or be made payable at par in Winnipeg, and to the order of the clerk named herein. Pay your taxes and save the percentages which are added from 1st January, 1903, at the rate of 6-10 per cent. per month on

all unpaid taxes. Note: American drafts not payable in Winnipeg must include exchange. Return this notice when making payment."

These taxes were not paid by the plaintiff, nor were the arrears required to be paid to redeem the land.

It appears that in October, 1902, the plaintiff heard of the final issue of certificate to the city, and his solicitors, Messrs. Tupper, Phippen, & Tupper, of this city, then wrote the following letter to the city clerk:—

"Oct. 31st, 1902.

"C. J. Brown, Esq.,
"City Clerk, Winnipeg.

"Dear Sir:—The city has, we understand, through tax sale, obtained title to lots 1 to 4, parts of 5 to 22, 23 to 55, parts of 56 to 74, and 75 to 88 inclusive, in block 8, and lots 1 to 29, parts of 30 to 41, parts of 48 and 49 to 88 in block 9, all in 43 and 44 St. John West. The property belonged to Col. W.N. Ponton, of Belleville, Ont., and Mr. Ponton intended to redeem these lands from taxes as soon as he was in a position to do so, and before the time for redemption expired. Through an oversight on his part, however, the time was allowed to go by, and a certificate has issued to the city.

"This is a particularly hard case of Col. Ponton's. The land has been vacant and therefore entirely unproductive to him. He purchased it during the boom at a high price and has paid the taxes to the city ever since. The property is now worth a little more than the amount necessary to pay the city its taxes, interest, and costs of bringing the property under the Act.

"Under the circumstances we would ask the city to reconvey the property to Col. Ponton upon payment of taxes, interest, and costs as above. If under the Municipal Assessment Act there is any doubt as to the right of the city to make this conveyance, we have no doubt the Provincial Government, in amending the Assessment Act in the coming session, would give the city council authority to re-convey to owners where in the opinion of the council reasonable grounds exists for so doing, and where the city has been reimbursed all its charges against the land.

"We would be very pleased if the council after discussing this matter with the city solicitor would advise us of its willingness to meet Col. Ponton as far as possible.

Yours truly,

"Tupper, Phippen, & Tupper."

The provision in the Winnipeg charter as to the disposition of lands acquired by the city at tax sales then in force required the lands to be offered for sale at public auction before being disposed of privately, and the city had no power to re-convey lands so acquired to the original owner on payment of the taxes, interest, and costs. By sec. 3 of ch. 45 of the amendments to the Winnipeg charter, passed by the legislature at the session of 1903, the city was empowered to re-convey lands to former owners, on payment of taxes, interest, and costs. Section 409 of the Winnipeg charter was amended by striking out the portion thereof which required the city to advertise and offer by public auction lands acquired at tax sales before offering the same for sale by private contract. It is said that the application for this amendment was made by the city at the plaintiff's instance, to enable the city to permit him to redeem, but whether it was or not seems to me immaterial.

Negotiations had previously been opened with the city for the purpose of obtaining a re-conveyance to the plaintiff on the terms mentioned, and on 11th December, 1903, the finance committee of the council, before whom the matter was pending, reported to the council as follows: "That all lots formerly owned by A. W. Ponton acquired by the city at tax sale be conveyed to said Ponton on payment of all costs, interest, and taxes to date." That report came before the meeting of the council on 14th December, 1903, and was by resolution adopted. On the following day the city clerk, in the regular course of his routine duties, sent to the city solicitor, the city treasurer, the city comptroller, and the mayor, a letter notifying each of them of the action of the council of the previous evening, but no notice was sent to either the plaintiff or to any one representing him. It would appear, however, that the plaintiff's solicitor was present at the council meeting when the finance committee's report was adopted. Nothing was done under this report, and on 4th April, 1904, at a meeting of the council, notice was given by Alderman Harvey that at the next meeting of the council he would move that clause 4 of the report of the finance committee,

dated 11th December, 1903, and adopted by council on 14th December, 1903, be rescinded. On 16th April, 1904, the plaintiff's solicitor tendered to the city treasurer $592.93 as being the amount required to be paid under the resolution of the council dated 14th December, 1903. On 18th April, 1904, Alderman Harvey moved the resolution of which he had given notice two weeks before. The solicitor for the plaintiff was present, and was permitted to address the council, after which the motion to rescind was put and was carried by a vote of 10 to 2.

The city had advertised the lands in question, amongst others, for sale by public auction on 20th April, 1904. This action was brought on that day, and a lis pendens registered against all the lands On the 20th and the day following, the advertised lands were offered for sale, and the lands in question were sold on the 21st to various purchasers for the sum of $9,690.

The plaintiff bases his right to relief on two grounds. First, that the resolution of the council of 14th December, 1903, was accepted when the tender of 16th April was made. It is contended on behalf of the plaintiff that at the time of the tender a letter dated 16th April, 1904, was addressed to the treasurer, written by the solicitors, and was delivered to the treasurer, stating that they were instructed by the plaintiff to accept the proposition of the city under the resolution dated 14th December, 1903, and therewith handed him the sum of $592.93, being the amount required to be paid under that resolution for the lots in question. The young man who made the tender was called as a witness, but has no recollection of having delivered this letter. It was written on the day the tender was made and instructions for its delivery given. The plaintiff swears positively that when he was being examined for discovery in Belleville before the trial he saw the original of that letter in the custody of the city's counsel, and that he made a copy of it. I think I must infer from that evidence that that letter was delivered at the time the tender was made. The question to be determined is, does the resolution of the council and the letter of acceptance constitute a contract binding upon the defendants. This will depend upon whether or not the council could bind itself by resolution. . The general jurisdiction of the council is laid down in sec. 472 of the charter as follows: " The jurisdiction of the council shall be confined to the city except where autho-

rity beyond the same is expressly given, and the powers of the council shall be exercised by by-law when not otherwise authorized, or provided for." There is no express power contained in the Winnipeg charter authorizing the council to dispose of lands such as those in question by resolution. The law bearing on the manner in which a municipal corporation can bind itself by contract has been dealt with in a great number of cases, but I do not think a review of them would serve any useful purpose. No case was cited in which the corporation was held liable under circumstances such as exist in this case. On the contrary, I think it is fairly well established that the city made no contract with the plaintiff, or at least no contract that the plaintiff can enforce. I refer particularly to such cases as Leslie v. Malahide, 10 O. W. R. 199; Bernadin v. North Dufferin, 19 S. C. R. 581; Tracey v. North Vancouver, 34 S. C. R. 132; and Waterous v. Palmerston, 21 S. C. R. 556.

The other grounds taken by the plaintiff is that the city have estopped themselves from denying that the plaintiff is still the owner of the lands in question. It was argued by Mr. Minty that an analogy exists between the position of the city having acquired title to lands under tax sale and a mortgagee having foreclosed, and that anything which, done by a mortgagee after foreclosure, would open the foreclosure and permit redemption, would in like manner, if done by the city, after they had acquired title to the lands by tax sale, waive the forfeiture and permit the original owner to redeem. I must say there appears to me considerable force in that contention. The acts relied upon by the plaintiff as estopping the city are, first, the letter written by the treasurer in reply to the plaintiff on 4th December, 1901. It is contended that the treasurer should have in that letter notified the plaintiff that the city were liable to acquire title by the issue of the certificate in the land titles office at any time. I cannot see that the plaintiff has any reasonable ground for a complaint on that score. The notice served upon him from the land titles office gave him 6 months in which to redeem, and the synopsis of the Assessment Act indorsed upon it informed him that he had the right of redemption at any time before the final issue of certificate of title, and when in his letter to the tax collector of 4th November, 1901, he says, "I understand from this that the lots are still assessed to me, and that I still have an opportunity of redeeming them,"

he was quite correct in his understanding of what his rights were. It seems to have been a surprise to him that he still should have the right to redeem, but, owing to the delay in the issue of certificate, that right still existed.

The letter of the treasurer could have in no way misled him; and it impliedly informed him of his right of redemption by stating the amount required to redeem. The right of redemption still existed until 7th April, 1903, some 5 months afterwards, and yet the plaintiff took no steps to pay the amount which he was then notified it was necessary to pay.

The other ground on which estoppel is based is that after the final certificate of title had issued to the city, the lands were still assessed to the plaintiff and notice of assessment sent to him, and later on, in November, 1902, a demand was made upon him for taxes. It is contended that these positions are absolutely inconsistent; that the city cannot, while insisting on their own ownership of the lands, assess them in the name of the former owner and demand from him the taxes. It is said that assessing lands in the name of the plaintiff rendered him liable in an action for the taxes, and, were he a resident, would subject his goods to distress and sale. It was pointed out that sec. 372 of the charter makes the production of the collector's roll, shewing taxes in arrear in respect of any person or property, prima facie evidence that such taxes are in arrears, as well as the mailing of such notice, and by sec. 387, that in an action by the city for the taxes the production by the assessment commissioner of a true copy of the collector's roll shall be sufficient evidence of debt. This, however, does not necessarily fix the owner with liability for the taxes. All that sec. 387 says is that the production of the roll shall be sufficient evidence of debt. That does not mean conclusive evidence. And it seems to me that a complete answer to the action would be that the plaintiff was not the owner at the time of the return of the assessment roll, and its final revision. The question of whether or not the assessment of the lands to the plaintiff and the subsequent demand for taxes works an estoppel upon the city is not free from difficulty. It appear that the assessment commissioner has adopted the practice of closing the books in his office as of 31st December in the year preceding the year for which he is making the assessment. Up to that date he makes careful searches in the land titles and registry

offices and other sources of information mentioned in the Act, and enters on his roll all persons who up to that date appear to be liable to assessment. It is necessary that some date should be fixed. The return of the assessment roll would be a practical impossibility if the changes that take place from day to day had to be noted in it. On 31st December, 1901, the plaintff was, and continued to be, the proper person to whom these lots should be assessed, up to the issue of the certificate on 7th April, 1902. Before that date his name had been entered on the assessment roll, which was finally completed and returned to the council in the beginning of May. The plaintiff on receipt of the assessment notice made no complaint, and the result was that the roll was finally passed by the Court of Revision without any change being made in the assessment of these lands. The Court of Revision sits only to hear complaints, and, as no complaint was made, it was finally revised without change so far as these lands were concerned. The collector's roll is prepared from the assessment roll (see sec. 356), and no change could be made after the assessment roll was finally revised, so that the plaintiff's name necessarily appeared in the collector's roll. It was the duty of the tax collector as soon as the tax roll was received by him to send to each person appearing on it a demand for taxes (see sec. 364). The assessment commissioner in preparing and returning the assessment roll and sending out the notice of assessment, and the tax collector in sending the demand for taxes, were performing their statutory duties as officers of the city. The council has no discretion as to the sending out of either of these notices. The statute provides that these notices shall be sent out by the respective officers. It does not appear that the question of whether either of these notices should be sent out ever came before the council, or that the council was called upon to exercise any discretion as to whether or not either of them should be withheld or sent forward. In the ordinary course of proceeding the matter would not come before the council. It cannot be said, therefore, that the assessment of these lands in the name of the plaintiff or the sending of either of these notices mentioned was the deliberate act of the council. They were merely the acts of statutory officers performing statutory duties. It was held in Chicago v. Sexton, 115 Ill. 244, that a municipal corporation may be estopped by the action of its proper officers when the corporation is acting in its

private as contra-distinguished from its governmental capacity; and in Maximalian v. Mayor of New York, 62 N. Y. 161, it is said that if the act of the officer is done in the attempted performance of a duty laid by the law upon him, and not upon the municipality, then the municipality is not liable for his negligence therein. There does not appear to be any direct authority upon the question in our own Court. But McLellan v. Assiniboia, 5 Man. L, R. 369, is a case somewhat in point. It was there held that an action to compel the issuance of a tax deed to a purchaser after a sale of land for taxes held by the municipality did not lie against the municipality, but that the action would have to be brought against the officers of the municipality whose duty under the statute it was to issue the deed. In delivering judgment, as a member of the full Court, the late Mr. Justice Bain said: "The collection of taxes is not a strictly corporate duty, but public, and in a sense governmental, and the officers of a municipality while engaged in performing such duties are public officers, and not merely the officers or agents of the municipality." With that statement I entirely concur. I do not think that either the assessment commissioner or the tax collector, in the performance of their duties as such, were the agents of the city in the sense that the city would be estopped by their acts.

At the time these notices were sent out, the title to the city was absolute, having been completely vested by a absolute certificate of title under the Real Property Act. The sending of the notices could not have the effect of divesting the city of their title and re-vesting it in the plaintiff. And it does not seem to me that any act performed by the city after they had obtained title has had the effect of making the city a trustee of the lands for the plaintiff.

The action must, therefore, be dismissed with costs.

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COURT OF APPEAL.

SLATER v. RYAN.

Trade Mark—Infringement—Advertisement — Injunction—Use of Defendant's Own Name—Absence of Fraud—Passing-off—Refusal of Injunction—Discretion — Appeal—Costs.

Appeal by plaintiffs from judgment of MATHERS, J., 5 W. L. R. 142, upon a motion for an interim injunction, turned by consent into a motion for judgment, dismissing the action.

THE COURT (RICHARDS, PERDUE, PHIPPEN, JJ.A.), while expressing the opinion that the advertisement in the form in which it appeared would, if persisted in, have meant an infringement of the plaintiffs' trade name, held that the appeal should be dismissed, on the ground that the action had been commenced prematurely, after defendant had voluntarily withdrawn the advertisement and before any complaint was made. The circumstance that the advertisement was not put in by Ryan himself, but by his advertising agent, and withdrawn as soon as it came to his knowledge, should be taken into account. Also, the fact that 16 days had elapsed from the withdrawal of the advertisement before the suit was commenced. In such circumstances the discretion the Judge below had exercised in refusing an injunction should not be disturbed. No costs of appeal to either party.

The Court was also of the opinion that it was not necessary for the plaintiffs to prove fraud on the part of the defendant, or an intention to deceive, and that it was sufficient that the advertisement was calculated to deceive.

MANITOBA.

MATHERS, J. OCTOBER 18TH, 1907.

TRIAL.

RE MORRIS PROVINCIAL ELECTION.

Parliamentary Elections—Controverted Election Petition—Preliminary Objections—Security—Deposit of Current Money of Canada—Proof—Affidavit Verifying Petition—No Necessity for—Rules of Court—Manitoba Controverted Elections Act—Power of Judges to Make Rules Requiring Affidavit—Practice and Procedure—Statutes—Headings to Groups of Sections—Evidence of Furnishing Security—No Necessity for Service on Respondent—Receipt—Scrutiny—Seat Claimed on Behalf of Candidate at Election—Status of Petitioners — Proof of—Voters' Lists—Preparation and Revision — Lists Actually Used by Deputy Returning Officers—Presumption—Failure to Negative Disqualification — Leave to Supplement Evidence.

Preliminary objections and grounds of insufficiency urged on behalf of the respondent against the petition and the petitioner, and against the security for costs, as follows:—

1. Because the petitioners were not and are not electors who had a right to vote at the election to which the petition relates, nor were they candidates at the election, nor were they persons, nor is either of them a person, who may by law present a petition such as is presented in this matter.

2. Because a true copy of the petition was not served upon the respondent within 5 days from the time of presentation thereof.

3. Because the petitioners have not furnished the security for costs required by the Act, nor in the manner prescribed by the Act.

4. Because the petitioners did not, immediately upon the presentation of the petition, give notice thereof in the Manitoba Gazette, and in a local newspaper, nor was such notice properly dispensed with.

5. Because notice of the presentation of the petition was not served upon the respondent, as required by the Act.

6. Because respondent was not served with proper evidence of the furnishing of security for costs.

7. Because the petitioners were, and each of them was, guilty of corrupt practices at and during the said election, and were in consequence disqualified and not entitled to present the petition.

8. Because the returning officer has not returned the respondent as being duly elected.

9. Because notice of the election of the respondent has not been published in the manner prescribed by the Manitoba Elections Act.

10. Because the petition was not signed by the petitioners.

11. Because when the petitioners affixed their signatures to the petition they were not aware of the contents thereof.

12. Because the election was not holden at the time set forth in the petition.

13. Because the petition was not presented within 30 days after the date of publication in the Manitoba Gazette of the notice of election by the clerk of the executive council.

14. Because the petition was not delivered at the office of the prothonotary of the Court of King's Bench at Winnipeg during office hours.

15. The respondent objects to paragraphs 24 to 34 inclusive of the petition, and alleges that if the allegations therein contained were true and were established by evidence, these facts would not be sufficient to justify the unseating of the respondent or the declaring of the seat vacant, and would not be sufficient to justify the Judges on the trial of this petition in disqualifying the respondent, and that there is no power under the Manitoba Controverted Elections Act to declare one J. P. Molloy elected.

16. The respondent objects to the said paragraphs of the petition, on the ground that they do not allege any corrupt practices within the meaning of the term, as explained by the Manitoba Controverted Elections Act, and the respondent demurs to the said clauses.

17. Because the petitioners did not file an affidavit with the prothonotary stating that they have good reasons to believe and do verily believe that the several allegations contained in the petition are true, nor was the respondent served with a true copy of the affidavit.

Wherefore the respondent submits that the said petition should be dismissed, and that no further proceedings should be taken thereon.

These objections were presented, and argued before MATHERS, J., in Chambers.

A. J. Andrews and C. H. Campbell, for the respondent.

J. E. O'Connor and H. P. Blackwood, for the petitioners.

MATHERS, J.:—It seems to me the decision of the full Court in the St. Boniface Election case, 13 Man. L. R. 75, disposes of the objection that the security deposited with the prothonotary was not shewn to be current money of Canada. The deposit was made of one $500 note, 100 $2 notes, and 50 $1 notes said to be Dominion of Canada bills. The identical bills were preserved and produced at the hearing of the preliminary objections. The prothonotary received them as genuine Dominion bills, and gave a receipt therefor, so describing them. The accountant in one of the banks, with a banking experience of 10 years, was called and testified that they were genuine Dominion of Canada notes. The prothonotary swore that the deposit was made in Dominion notes. The bank official did not know by whom Dominion notes should be signed, or the genuineness of the signatures purporting to be upon them, but he recognized them by the paper and the scroll upon them and by their general appearance. The additional evidence given in the St. Boniface case was that of the bank teller who paid the notes to the petitioners' agent as Dominion notes and of the bank teller who received them for deposit from the prothonotary as current money. This additional evidence, however, was merely cumulative, and did not supply any link in the chain of proof not covered by the evidence in this case. In the St. Boniface case the notes had been deposited in a bank by the prothonotary, and their identity lost, but in this case the identical notes were produced, and were there for examination, and the respondent had an opportunity to shew that they were not genuine. In the St. Boniface case Chief Justice Killam

referred to a previous decision of his own in the Beautiful Plains Election Case, where he held that the production of the identical notes, coupled with the testimony of an expert as to his belief in their genuineness, was sufficient prima facie evidence.

I think the petitioners have sufficiently established that the security was given in current money of Canada.

Another objection is that no affidavit verifying the petition was presented with it. There is no provision in the Manitoba Controverted Elections Act in terms requiring this to be done. Section 6 of the Dominion Controverted Elections Act, R. S. C. 1906 ch. 7, does, however, require that at the time of the presentation of the petition there shall also he presented therwith an affidavit by the petitioner that he has good reason to believe, and verily does believe, that the several allegations contained in the petition are true.

Section 10 of the Manitoba Act provides that the Judges of the Court of King's Bench, of whom the Chief Justice shall be one, may from time to time make, revoke, or alter general rules or orders for the effectual execution of the Act and of the intention and object thereof, and the regulation of the practice and procedure with respect to election petitions and the trial thereof and the certifying and reporting thereof; and sec. 13 provides that until rules have been made in pusuance of the Act and in all cases unprovided for by such rules when made, the principles, practice, and rules then in force by which election petitions touching the election of members of the House of Commons of Canada are governed shall be observed, so far as consistently with this Act they may be so observed.

Pursuant to an earlier Act containing a like power, rules were made by the Judges and are found at the end of vol. 8 of the Manitoba Law Reports. These consist of 57 rules, which, with the exception of Rule 18, which has been rescinded, are still in force. None of these rules requires the petition to be verified by affidavit, and it is argued that this is something, therefore, that is "unprovided for by such rules," and, not being inconsistent with the Manitoba Act, "the principles, practice, and rules" by which election petitions under the Dominion Act are governed, shall be observed, as provided for in sec. 13 of the Manitoba Act.

Section 85 of the Dominion Act gives power to the Judges to make rules, and sec. 86 provides that until rules have been

made, the principles, practice, and rules on which election petitions touching the election of members of the House of Commons in England were, on the 26th day of May, 1874, dealt with, shall be observed, so far as consistently with that Act they can be observed by the Court and the Judges thereof. No rules have ever been made by the Judges under the Dominion Act. The English rules of 1868 therefore apply so far as applicable to petitions under the Dominion Act. These latter rules do not require the petition to be verified, so that the only provision requiring that to be done is sec. 6 of the Dominion Act.

It was strongly argued by Mr. Andrews, counsel for the respondent, that this provision of the Dominion Act is, by sec. 13 of the Manitoba Act, made applicable to petitions under that latter Act. He argues that the verification of the petition is one of the matters "unprovided for" by the Manitoba rules, and consequently the "principles, practice, and rules" applicable to Dominion petitions apply. At the hearing I was a good deal impressed with this argument, but further consideration has convinced me of its unsoundness. The cases relied upon by respondent's counsel as supporting the principle contended for are: The Lisgar Election Case, 20 S. C. R. 1, and The Burrard Election Case, 31 S. C. R. 459, which followed the Lisgar case. Both of these cases dealt with petitions under the Dominion Act, which plainly makes the English rules applicable, as no rules had then, or for that matter have since, been made by the Judges under the Dominion Act.

The English rule 1 requires the petitioner when presenting the petition to leave a copy thereof with the prothonotary for transmission to the returning officer. It was held in these cases that the failure to comply with that rule was fatal to the petition. That and nothing more is what was decided in these cases. They are therefore of very little assistance in this case.

The principles, practice, and rules applicable to Dominion elections are only to be invoked in cases unprovided for in the Manitoba rules. That implies the further limitation to matters concerning which the Judges would have jurisdiction to make rules. The concurrence of two things is essential before the Dominion practice can be applied in any particular case: first, the subject must not have been dealt with by the Manitoba rules; and secondly, it must be something

concerning which the Judges would have power to make a rule. In this instance there is no local rule dealing with the question. This limits the inquiry to whether or not the Judges have power to make such a rule.

By section 10 of the Manitoba Controverted Elections Act, rules may be made "for the effectual execution" of that Act, "and of the intention and object thereof and the regulation of the practice and procedure with respect to election petitions and the trial thereof and the certifying and reporting thereof."

Under that Act one or more electors who had a right to vote at the election may present a petition, whether or not they have any knowledge as to the facts alleged in it. Under the Dominion Act the petitioner must swear that he has good reason to believe and verily does believe that the several allegations contained in the petition are true. And, although the truth or falsity of that affidavit cannot be inquired into with a view to having a petition dismissed, if the affidavit is found to be false, yet, as stated by Mr. Justice King in the Lunenberg Election Case, 27 S. C. R. at p. 230, "the Act treats the petitioner . . . as a credible person who will declare his honest belief under oath . . . and adopts his act as a qualification inter alia for his becoming petitioner."

Prior to the decision in this latter case, the full Court in Manitoba had held that an inquiry could be made into the truth or falsity of the petitioner's affidavit, and, if it appeared that it was untrue, the petition should be dismissed as an abuse of the process of the Court: In re Marquette Election, 11 Man. L. R. 381. These decisions make it sufficiently apparent that the necessity of verifying under oath the facts alleged in the petition is a serious—though possibly a very proper—limitation on the right to present a petition. As stated by Mr. Justice King, the Act imposes the making of the affidavit upon the elector as an additional qualification for his becoming a petitioner. The object and intention of the Manitoba Act is that any person who had a right to vote may petition. A rule imposing this new qualification, and limiting the right to petition to those electors only who had good reason to believe, and did believe, the allegations in the petition to be true, and were willing to so pledge their oath, would not be a rule "for the effectual execution" of the

Act and of the "intention and objects thereof," and would, in my opinion, be ultra vires.

It remains to consider whether such a rule would be one for "the regulation of the practice and procedure with respect to election petitions."

"Practice" and "procedure" are, as used in the Act, I think, convertible terms.

"'Practice,' in its larger sense," says Lord Justice Lush in Payser v. Minors, 7 Q. B. D. 333, "denotes the mode of proceeding by which a legal right is enforced as distinguished from the law which gives or defines the right." Where used in its ordinary and common sense, it denotes the rules that make or guide the cursus curiæ and regulate procedure within the walls or limits of the Court itself: Attorney-General v. Sillem, 33 L. J. Ex. 209. A rule which required a petitioner to verify his petition under oath would effect an important change in the law of the land, and might deprive all but a small proportion of the whole body of electors of the right which the Act gives them of presenting a petition. In my opinion, the Judges have no such power.

Had the legislature intended to make verification under oath an essential preliminary to the presentation of a petition, it would have been very easy to have said so, and it is hardly to be presumed that it deliberately adopted such a roundabout way of expressing an intention that might have been so much more easily expressed directly. Such a presumption, however, would be of no avail if the contrary intention could be gathered from the plain reading of the Act. I have dealt with one phase of the Act which, to my mind, indicates the proper construction to be different from that contended for by the respondent, but the Act affords further evidence that it was not the intention to incorporate the provisions of the Dominion statute.

The group of sections in which sec. 13 is found is headed "Rules of Court."

"Headings to groups of clauses constitute an important part of the Act itself, and may be read not only as explaining the sections which immediately follow them as a sort of preamble thereto, but as affording a better key to these sections than a mere preamble:" per Baron Channell in Eastern Counties R. W. Co. v. Marriage, 9 H. L. Cas. 41. See also Maxwell on Statutes, p. 75; Commissioners of Income Tax v. Pernsel, [1891] A. C. 548; and 26 Am. & Eng. Encyc. 629.

The fact that these sections are headed "Rules of Court" indicates that the subjects dealt with therein are Rules of Court and matters which might be made the subject of a Rule of Court as distinguished from statutory enactments. I think, therefore, that this objection fails.

A further objection is that the respondent was not served with proper evidence of the furnishing of the security. The Manitoba statute does not require the clerk of the Court to give a receipt for the deposit, but sec. 15 of the Dominion Act does require such a receipt to be given. As a matter of fact, in this case a receipt was given by the prothonotary, but a copy of it was not served upon the respondent. Manitoba Rule 11 requires a copy of the recognizance or bond to be served within 5 days after the presentation of the petition. It is argued that under that rule a copy of the receipt should now be served. At the time the Manitoba rules were passed (1886), the security required had to be given by the deposit of a recognizance or bond, and the reason why a copy was required to be served is obvious. The recognizance or bond constituted the security, and upon its form and the sufficiency of the bondsmen hung the question of whether or not sufficient, or any, security had been given. Now, however, that the security has to be by legal tender, a copy of the receipt would convey no information to the respondent as to the validity of the security given. Apart altogether from the reason of the thing, I think this objection can be disposed of on the short ground that a receipt is neither a recognizance, nor a bond, and there is nothing in either the Act or the rules requiring a receipt for the security to be either taken or served.

Under objections 15 and 16, paragraphs 24 to 34, both inclusive, of the petition are demurred to, on the ground that they do not allege any corrupt practices within the meaning of that term as used in the Manitoba Controverted Elections Act. The sections of the petition complained of ask for a scrutiny, and claim the seat on behalf of the opposing candidate. The argument based on these objections is that no provision is made for a scrutiny by the statute. Section 16 of the Act mentions a number of things that the petition may complain of, one of which is an undue return of a member. Section 67 provides that if the seat is claimed for a candidate who is not a party to the petition, such candidate may be examined as if he were a petitioner. Section

90 provides that at the conclusion of the trial the Judges who tried the petition shall determine whether the member whose election or return is complained of, or any or what other person, was duly returned or elected, or whether the election was void; and sec. 129 provides that the Speaker shall, at the earliest practicable moment after having received the judgments and reports, adopt all the proceedings necessary for confirming or altering the returns of the returning officer, or for the issuing of a new writ for a new election, or for otherwise carrying the final judgment into execution, as circumstances may require. Imperial Rule 7 makes provision, where the seat is claimed for an unsuccessful candidate, for delivering particulars of the votes objected to 6 days before the trial, and Manitoba Rule 19 is to the like effect. Local Rule 4 and the form of the petition appended to Rule 5 shew clearly that, in the opinion of the Judges who framed the rules, the seat may be claimed on behalf of the candidate who was not returned. In the Ontario Act there is special provision for conducting the scrutiny claimed by the petition: R. S. O. 1897 ch. 1, secs. 76 to 85; but the other provisions of that Act under which the scrutiny is sought do not appear to be materially different from the provisions of our own Act. I am clearly of opinion that the right to a scrutiny exists under the Manitoba statute, and, no doubt, the tribunal assigned to try the petition will be able to mould its proceedings so as to give effect to the manifest intention of the Act. Objections 15 and 16 therefore fail.

The next objection argued is as to the status of the petitioners. It is well settled that upon the status of the petitioners being challenged by preliminary objection, the onus is upon them to prove it. The evidence adduced in this case is: first, the original list of electors for the whole constituency as revised by the revising officers; secondly, one of the certified copies of the printed list sent by the clerk of the Executive Council to the returning officer with the writ of election, as required by sec. 108 of the Manitoba Elections Act; and thirdly, the certified list furnished by the returning officer to the deputy returning officer, pursuant to sec. 152, and which had been actually used by that official. It was shewn that this latter list had been sent by the clerk of the Executive Council to the returning officer, and by him delivered to the deputy returning officer; that the latter official used this particular list at the election, and

returned it with the other election documents in the ballot box to the returning officer, by whom it was delivered back to the clerk of the Executive Council, and by such clerk it was produced before me. The Gazette containing the proclamation appointing registration clerks to prepare the lists, under sec. 5 of the Act of 1904 to amend the Elections Act, was put in evidence. The appointment of the revising officer and his final revision of the list produced and delivery thereof to the clerk of the Executive Council was also proven, as was likewise the printing of the list by the King's printer. The name of one of the petitioners correctly appears on the original revised list, upon the certified printed list for the whole constituency, and also upon the list for polling division number 6, which had actually been used by the deputy returning officer at that poll, as before mentioned, and the petitioner was identified as the person named in these several lists. It was also shewn that this petitioner actually voted at this poll. The initials of the other petitioner are not the same as the initials of the person of that name mentioned in the lists. He swore that the name on the list was intended for him, and that he actually voted upon it, but, as one petitioner is sufficient, it is not necessary to deal with the question of his right to petition.

It is argued that the evidence given is not sufficient to prove the petitioners' status, but that every step required by the statute to be taken in the preparation and revision of the list must be shewn to have been duly taken.

From the report of the decision of the full Court in Re Brandon City Election, 9 Man. L. R. 571, it does not clearly appear what evidence of the authenticity of the list produced was given. In the absence of such evidence, that case cannot to be relied upon as determining the point raised in this case. The decision in the Brandon case is that the presence of the petitioner's name on the list for the whole constituency, mentioned in sec. 148 of the then Act, sec. 183 of the present Act, is sufficient evidence that he is an elector, and that it is not necessary to shew that his name was on the list actually used by the deputy returning officer. In this respect the full Court refused to apply the decision of the Supreme Court in Re Richelieu Election, 21 S. C. R. 168. In the Brandon case Chief Justice Taylor dissented from the majority of the Court, his opinion being that it must be shewn that the petitioner's name was on the list actually

used by the deputy returning officer. The other members of the Court do not hold that the presence of the name on such list would not be sufficient, but do hold that the existence of the name on the general list is sufficient. In Re Cypress Election, 8 Man. L. R. 581, the only evidence adduced in support of the petitioner's status was an affidavit that he was an elector and had a right to vote, and the decision was that the evidence was not sufficient. The learned Judges do not, however, discuss the question of what would be sufficient evidence, and the late Mr. Justice Bain, at p. 600, makes this statement: "The right of a person to vote at an election depends on whether or not his name appears on the list of electors certified by the clerk of the Executive Council; and to such a list the maxim omnia præsumuntur would be applicable, and prima facie every one whose name appears on such a list would be held to be legally entitled to vote." That quotation shews that Mr. Justice Bain had in his mind the very question now to be determined.

Section 183 of the Manitoba Elections Act provides that "every person whose name appears as an elector on the list made as by this Act provided or in force at the time of any election to which this Act applies, shall be entitled to vote at such election, provided at the time of such election such person is not disqualified under the provisions of the next following section."

By sec. 108 the clerk of the Executive Council shall transmit to the returning officer a sufficient number of the lists of electors certified by him; and by sec. 152 it is the duty of the returning officer to furnish each deputy returning officer with the list of electors, or such copy of or extract from the list as contains the names of the electors registered for his polling division, certified by the clerk of the Executive Council.

Section 191 provides that an intending voter shall declare his name, etc., "and, if such name be found on the list of electors," the deputy shall, if required, put the oath prescribed, one clause of which is, "that you are the person named (or purported to be named) on the list of electors now shewn to you," and sec. 194 provides that the deputy shall then ascertain that the name of such person is entered, or purports to be entered, upon the list of electors for his polling division, and perform certain other duties such as recording the oath taken and any objections raised, etc., and

shall then detach a ballot paper and give it to such person. Section 277, sub-sec. (f), imposes on the deputy a minimum fine of $500 if he deliver or supply any person with a ballot unless such person's name appears on the list of electors supplied to such deputy returning officer by the returning officer, or if he refuse to give a ballot paper to a properly qualified elector. What constitutes a "properly qualified elector" is shewn by secs. 183 and 184. By 183, "every person whose name appears as an elector on the list made as by this Act provided, or in force at the time of any election to which this Act applies," is such a person, provided he is not disqualified under sec. 184. Section 184 enumerates the other qualifications besides being on the list, namely, being of the male sex, 21 years of age, a British subject, etc.

Suppose a person having all the qualifications enumerated in sec. 184 presents himself and asks for a ballot, has the deputy returning officer any right to refuse to give him one, provided his name is on the list in the hands of the deputy? Section 194 lays down the duty of the deputy. By sub-sec. (a) he shall ascertain that the name of such person is entered or purports to be entered on the list of electors for his polling division. This he can only do by looking at the list furnished him by the returning officer, because he has access to no other. By sub-sec. (c), if the person takes the oath or affirmation, that fact is to be noted. By sub-sec. (f), a person who refuses to take the oath shall not be given a ballot; by sub-sec. (g), when the proper entries have been made the deputy shall initial the ballot paper; and by sub-sec. (h), the ballot paper shall then be detached from the counterfoil and delivered to such person. The only case where the deputy can refuse a ballot is where, under sub-sec. (f), the person presenting himself has refused to take the oath, if requested so to do, and, in certain cases under sec. 193, where he knows fraud or violence is being practised. It appears to my mind clear that, if a person, otherwise qualified, applies for a ballot, and his name appears on the list supplied to the deputy returning officer by the returning officer, he is entitled to receive such ballot, and a refusal by the deputy to give him one would subject such deputy to the penalties mentioned in sec. 277. To my mind, the plain conclusion deducible from this is that the legislature has made the list in the deputies' hands compet-

evidence of the proper qualification of the electors named therein.

But, even if this conclusion is not justified, surely something is to be presumed in favour of the list actually used by election officers who are sworn to discharge their duty. The list mentioned in sec. 183 is one made as provided in the Act, or in force at the time of the election. From the fact that the list was used and the election held upon it, should it not be presumed prima facie that it was the list then in force? The general presumption is that public officers perform their official duty, and that their official acts are regular: 22 Am. & Eng. Encyc. 1267; and where acts are of an official nature, or require the concurrence of official persons, a presumption arises in favour of their due execution: Broom's Legal Maxims, p. 722. In the Cypress Election case Mr. Justice Bain gave it as his opinion that the maxim omnia præsumuntur rite esse acta would apply to such lists, and I entirely concur in that opinion. For these reasons, I think that the production of either the list of electors for the whole constituency certified by the clerk of the Executive Council, or of the list actually used by the deputy returning officer, and the identification of the petitioner's name as being on one of these lists, is sufficient evidence that he is a "person whose name appears as an elector on the list made as by the Election Act provided, or in force at the time of the election."

The last objection raised is that there is no evidence that the petitioners are not disqualified under sec. 184. To entitle a person to present a petition, he must be an elector who had a right to vote. An elector is a person whose name is registered on the list of electors, but sec. 184 provides that, notwithstanding that fact, such person has no right to vote unless he is of the male sex, 21 years of age, and is a British subject, and is not disqualified in any of the several other ways enumerated in that section. I think the onus was upon the petitioners to prove that they or one of them was qualified under this section. They have not done so, and I must hold that, to that extent, they have failed to prove their status.

When this point was raised, counsel for the petitioners applied for permission to adduce the necessary additional evidence. The petitioners were produced before me, and were cross-examined by the respondent's counsel. If he had had any doubt about their qualification, he could easily have

established that fact then, but he refrained from putting any qrestions that would cover the point. I cannot say that he was not perfectly justified in the course he pursued. He was not bound to point out the slip of petitioners' counsel or supply any defects in his proof, but these facts do not strengthen his position, when he now opposes the application for permission to recall the petitioners to cure what was a manifest slip.

If this were a civil action pending before me, I would not hesitate to grant the application if, by the imposition of terms, I could protect the opposite party from injury. I do not know why any different rule should be applied here.

The petitioners may within 3 weeks, or such further time as I may, upon special application, allow, give the necessary evidence of the petitioners' qualification under sec. 184 of the Elections Act, upon payment to the respondent of the costs of the additional attendance so rendered necessary, which costs I fix at $25.

If, within such 3 weeks or within such further time as may be allowed, such evidence is not given, the petition will be dismissed with costs.

MANITOBA.

MACDONALD, J. OCTOBER 26TH, 1907.

TRIAL.

MUNROE v. FERGUSON.

Chattel Mortgage—Seizure by Mortgagee—Sale of Goods—Bona Fides—Right of Vendee as against Execution Creditor of Mortgagor—Bills of Sale Act—Actual and Continued Change of Possession..

Interpleader issue to determine whether, at the time of the seizure of certain goods by the sheriff of the western judicial district, under an execution issued out of the Court of King's Bench on a judgment recovered by the defendant in the issue against John Simpson and Alexander L. McRae, the same were the property of the plaintiff as against the execution creditor.

G. R. Coldwell, K.C., and J. P. Curran, for plaintiff.

J. F. Kilgour, for defendant.

MACDONALD, J.:—John Simpson and A. L. McRae were the lessees of the hotel premises in the city of Brandon known as the Grand Union Hotel, and were on 27th May, 1907, financially embarrassed and in insolvent circumstances.

The furniture in the hotel was under chattel mortgages, and the lessees were largely in arrears for rent, besides owing various other large amounts.

On 27th May, 1907, a warrant was placed in the hands of William Henderson as bailiff of the mortgagees of the chattels, and a warrant was also placed in the hands of the same bailiff by the landlord of the premises, authorizing the bailiff to distrain the goods and chattels under the chattel mortgage and also under the warrant for the arrears of rent.

The bailiff, on the evening of 27th May, 1907, called at the hotel and interviewed Simpson, one of the proprietor tenants, and shewed him the warrants, and suggested to him a sale of the business to the plaintiff herein. As a result of the interview, a sale was effected from Simpson and McRae to the plaintiff for $6,500, the plaintiff assuming the chattel mortgage indebtedness, the arrears of rent, and certain other debts due and owing by Simpson and McRae, contracted in connection with the hotel business, the debt due the defendant herein being omitted from the list of the creditors thus favoured.

The plaintiff immediately entered into possession, the then proprietors handing over the keys of the premises and giving the plaintiff the combination of the safe, after securing possession of all the cash on hand to that date.

A memorandum of agreement between the parties was executed and filed.

A. L. McRae did not at the time reside in the hotel, nor did he return to it after the sale. John Simpson remained in the house for 2 or 3 days after the sale, and then left and did not return, and the plaintiff continued in possession, secured a license in his own name, and continued the business thereafter.

On 18th June, 1907, the writ of fieri facias de bonis under which the seizure referred to was made was placed in the hands of the sheriff of the western judicial district, when the goods were claimed by the plaintiff herein under his contract of purchase with Simpson and McRae.

It is urged on behalf of the defendant that the sale was not bona fide, and that the transaction was simply a taking possession by the mortgagees for their own benefit and to

secure other claims in the nature of simple contract debts due them by Simpson and McRae, and that Munroe was put in charge as manager. The evidence does not justify that conclusion, and, although certain creditors secured an advantage by the transaction, the plaintiff was not a party to it, and I must find that there was an actual bona fide sale.

The only other point raised by the defence is that there was not an immediate delivery and a continued change of possession of the goods in question sufficient to satisfy the Bills of Sale and Chattel Mortgage Act.

The handing over of the keys of the building, giving the combination of the safe, and the former proprietors going out of possession, the securing by the plaintiff of a license in his own name, and the conduct of the business by him thereafter, were all acts of a notorious character.

The case seems to me even stronger from the plaintiff's standpoint that that of Trust and Loan Co. v. Wright, 11 Man. L. R. 314, and, from a perusal of all the cases cited by counsel, and a careful consideration of the evidence, I find that there was an actual bona fide sale, followed by an actual and continued change of possession.

The plaintiff is, therefore, entitled to judgment, together with costs.

MANITOBA.

DUBUC, C.J. OCTOBER 26TH, 1907.

TRIAL.

BERG v. KERN.

[redacted]

Partnership—Evidence to Establish—Agreement to Share Profits—Account—Reference.

The plaintiff alleged that a partnership existed between himself and the defendant in connection with the purchase and operating of a woollen factory situated in St. Boniface; he asked that an account be taken of the partnership dealings and property, and that it might be declared that he had a lien and charge on the lands and premises of the factory.

The defendant alleged that there was no such partnership and that he was the sole owner of the property in question.

E. Beveridge and A. H. S. Murray, for plaintiff.

A. M. S. Ross, for defendant.

DUBUC, C.J.:—The terms of the partnership as alleged by the plaintiff are that he was to furnish his experience and certain machinery he had in St. Paul, Minnesota; that the defendant was to put up the money to purchase and operate the woollen mill; that he was to have, as his share of the partnership, one-third of the partnership property and business, including the ownership of the land and factory premises; and that the defendant was to have the other two-thirds.

The defendant asserts that he purchased the mill, as well as the machinery of the plaintiff, with his own money; that he was to be the sole owner thereof; that he only employed the plaintiff as his foreman to operate the mill at a salary of $50 a month, with the understanding that, if the defendant succeeded, the plaintiff was to have one-third of the profits.

The mill property was purchased for $8,500. The defendant paid a portion of it at the time of the purchase, and has since paid the balance; he also disbursed other moneys in connection with the plaintiff's machinery and in repairing and operating the mill.

They decided to go to St. Paul to see the machinery, and the defendant paid the plaintiff $100 for the expenses of the journey, and to assist the plaintiff in bringing his family to Winnipeg. In St. Paul the defendant paid certain chattel mortgages and other charges on the machinery to get it released; the amount so paid being over $600. He also paid freight and customs duty in bringing the machinery to Manitoba, and having it delivered at the woollen mill. The defendant asserts that the $100 paid to the plaintiff in Winnipeg before starting for St. Paul, and the amount paid for the release of the machinery, was the price of the machinery which he had purchased from the plaintiff.

This took place in the latter part of August, 1904, and the machinery arrived in St. Boniface on 5th September, 1904. They set to work to install the machinery, make the necessary repairs, and put the factory in working order. They commenced to operate the mill about the end of October or beginning of November. It had been running for a

few weeks only, when, one morning, it was found that the pipes and radiators containing water were frozen and burst open. The defendant contended that this was due to the negligence of the plaintiff; he refused to advance any more money for repairs; and the factory was closed.

The plaintiff states that at the beginning of his negotiations with the defendant he told him that $20,000 or $21,000 would be required for the purchase of the factory, the necessary repairs, and the operating of the same, and then the defendant told him he had the money to do it, and would make the disbursement. The deed for the purchase of the mill property was made in the defendant's name. The plaintiff was aware of it, but he says the defendant told him that an agreement would be made between them embodying the terms of the partnership; that he asked the defendant for said agreement, but did not get it. All this is denied by the defendant.

Besides his own statement as to the existence of the partnership, the plaintiff has only the following facts in support of his contentions. He says he introduced the defendant to certain persons as his partner, and the defendant did not object; this is corroborated by the witness Jacobson. The plaintiff produced two tags or labels numbered respectively No. 144 and No. 146, with the letters "K. & B." written in pencil. The said letters are supposed to be for "Kern & Berg." The witness Nelson states that he was told by the plaintiff, in presence of the defendant, to place such labels on various parcels of goods in the factory before the plaintiff and the defendant started for St. Paul; he says he saw the defendant make some of the labels, but he did not see him write the letters "K. & B."

The plaintiff produced also a letter written by the defendant to his brother, I. W. Berg, addressed to him at Clan William. In said letter the defendant says: "I am writing you on behalf of Charley (meaning the plaintiff) and myself; we are sending you on to-day's freight the following goods to Minnedosa." Then follow a number of items, amounting to $37.50. Further on, he says: "We send you a few of our business cards and any business you can do will be greatly appreciated." On the business cards appears the following in large printed letters, "The North-West Rug and Blanket Manufacturer," but no name of owner, or owners, of the business is shewn on the card.

There is also the fact that, after the factory was closed, the defendant, desiring to sell a gasoline engine which was part of the St. Paul machinery, asked the consent of the plaintiff to do it. As to that, the defendant says he did so, not because he considered the plaintiff as having any right to prevent him from selling it; but, as the plaintiff was claiming an interest in it, he asked his consent to avoid any trouble about it.

The above are the material facts brought out in the evidence.

The main question to consider is: Was there a partnership? If so, what were the terms thereof?

According to the plaintiff's contentions, the defendant was to pay $8,500 for the factory, over $700 in connection with his own machinery in St. Paul, advance for the repairs, equipment, and operation of the mill a sum which, added to the two first items, would amount to about $21,000; and he, the plaintiff, by bringing in his experience and whatever was the value of his machinery, which he estimated at $2,500, was to have at once one-third interest in the whole real and personal property of the factory, viz., $7,000. He positively states that such was to be the result of the transaction.

This appears to be, as regards the defendant, a rather extraordinary bargain to make for a man who has money, with a man who claims to have only experience and some incumbered machinery—of which experience and machinery the defendant had no knowledge whatever, except what the plaintiff himself told him. If, however, such alleged transaction was clearly established, the Court would have to enforce it.

The plaintiff is alone to state what were the terms of the alleged partnership, as he claims it. What other evidence he adduced in support of his contention goes only to shew that there might have been a partnership, without in any way shewing what its terms might be.

On such evidence, I cannot hold that there was such a partnership existing between the parties.

Both the plaintiff and the defendant undoubtedly expected that the business of operating the factory would be a profitable one; and, on that expectation, the defendant was willing that the plaintiff would have one-third of the profits.

Sharing the profits of a business is not in itself absolute and conclusive proof of an existing partnership, but it con-

stitutes prima facie evidence that the parties are partners in the business: Lindley on Partnership, p. 47. The same author says, at p. 48: "The inference that where there is community of profit, there is a partnership, is so strong that, even if community of loss be expressly stipulated against, partnership may nevertheless subsist."

In this case the defendant concedes that the plaintiff was to have a regular and stated share in the profits. By this, as profits were expected, he admits that he intended the plaintiff to be his partner in such profits. What were the profits, if any, is not shewn. But as to the existence of a partnership between them, these are the main facts on which I have to pronounce: the plaintiff asserts that there was a certain partnership existing between the defendant and himself; the defendant admits another kind of partnership. It being so, I am driven to the conclusion that a partnership existed. As to its terms, I have to gather them from the evidence, from the conduct of the parties, and the circumstances connected with the whole affair. I find that there was a partnership existing as to the operating of the mill and in regard to the profits of the business.

I hold that the real property of the factory, land and buildings, is the sole property of the defendant. The defendant is also the owner of the machinery in the mill at the time of the purchase.

The plaintiff remains the owner of the machinery brought from St. Paul, but the defendant is to have a lien on the same for the price, transportation, and duty he had to pay in bringing it to the factory. The plaintiff is to be entitled to one-third and the defendant to two-thirds of the improvements and increase in value, if any, of either portion of the machinery when it was put in working order, as this ought to be considered as profits.

An account should be taken by the Master of the goods and materials in the factory at the time of the purchase, or which were bought afterwards; of the amount of goods manufactured while the mill was in operation; of the sale of the goods and price received and book debts, as well as of the unsold goods. An account should also be taken of the value of the machinery brought from St. Paul, and if the value exceeds the amount paid by the defendant on them, and they are retained by the defendant, the plaintiff should be entitled to the excess over the disbursement of the defendant on the same, but, if the defendant does not wish

to retain them, the plaintiff shall take them at their fixed value.

As the parties were partners, and there was no stipulation as to any rent to be paid by the plaintiff for the small house he occupied on the premises, I do not think the defendant should be entitled to any rent therefor.

If, on taking the accounts, there is a profit shewn in the operating of the mill as above stated, the plaintiff should be entitled to one-third and the defendant to two-thirds thereof.

If there is no profit, the plaintiff will only be entitled to his salary of $50 a month from the time he commenced to work in the factory until it was closed down; he will also be entitled to his machinery, or its value, on the terms above mentioned.

The caveat placed by the plaintiff on the mill property should be vacated and discharged.

The costs are reserved until after the report of the Master.

MANITOBA.

DUBUC, C.J. OCTOBER 26TH, 1907.

TRIAL.

CHARREST v. MANITOBA COLD STORAGE CO.

Negligence — Bailment — Warehoused Goods—Injury to, by Negligence of Bailees—Defective Storage Plant—Improper Operation — Warehouse Receipts — Stipulation as to Liability—Defects in Wrappers.

The plaintiffs were meat merchants of Winnipeg, and the defendants kept a warehouse and cold storage plant in that city.

From August to November, 1906, the plaintiffs delivered, at the defendants' warehouse, a certain quantity of meat to be frozen and kept in a frozen condition till called for. After a few months, the meat was found deteriorated and damaged to such an extent that it was condemned by the health inspector, as unfit for food, and ordered to be destroyed.

The plaintiffs alleged that the meat was deteriorated by the negligence of the defendants, and brought this action to recover damages for the value thereof.

The plaintiffs charged the defendants with negligence: (1) on the ground that their cold storage plant and building were defective and not properly equipped for freezing meat and keeping it frozen: (2) on the ground that the plant was not properly operated for the purpose.

The defendants, on the other hand, contended that the meat was not in a good and sound condition when delivered at their warehouse; or that it became deteriorated because it was wrapped in paper and canvass, and in that condition it could not be properly frozen.

C. P. Fullerton and H. W. Whitla, for plaintiffs.

D. H. Laird and E. F. Haffner, for defendants.

DUBUC, C.J.:—A great deal of evidence has been given by both sides on the different points of the issue, but, in my opinion, the most material fact involved in the case, viz., the real cause of the deterioration of the meat, has not been satisfactorily shewn or explained. Without attempting to discuss or analyze the testimonies of the numerous witnesses examined, I will state the conclusions I have come to on the main facts as I find them established.

On the whole of the evidence, and so far as it goes, I find that the meat was in a good and sound condition when it left the plaintiffs' premises and was delivered at the defendants' warehouse. I find also that the defendants had a properly constructed warehouse for the purpose of cold storage; that their plant is a first class cold storage plant, of modern type, and of sufficient power for the business intended to be done by the same; that the plant was operated with the ordinary and reasonable care which might have been expected in the carrying out of the business. The men in charge of the plant had not the higher and special knowledge which a man of scientific attainment might possess on the subject; but they had sufficient practical and even technical knowledge, which might be reasonably expected, to conduct such a business in an ordinarily satisfactory manner.

As to the wrapping of the meat being the cause of the damage, as asserted by the defendants, it was shewn by expert witnesses that meat so wrapped would require one or

two or more degrees of cold to freeze than unwrapped meat. It was shewn that, for two or three previous years, the plaintiffs had stored, with the defendants, meat wrapped in the same manner, and it had come out in good condition.

With the evidence before me, I am not satisfied and cannot find that the wrapping of the meat was the cause of its deterioration. If, however, as alleged by the defendants, it was established that this was the cause of the damage, I think that the defendants should not have stood by and allowed the meat to go into their warehouse in that condition without saying anything about it. It would have been their duty to decline receiving the meat, or to inform the plaintiffs that they would not hold themselves responsible for the non-freezing of the same. By receiving the meat so wrapped, they impliedly undertook to freeze it and keep it frozen, the same as any other meat brought to their cold storage premises. Failing in that duty to refuse the meat, or to inform the plaintiffs of the consequence, might be considered sufficient to constitute negligence for which they would be held liable. However, even if that be so, there is another point to be dealt with. In the warehouse receipts handed to the plaintiffs on every delivery of meat at the warehouse, there is a clause stating that "the company are not responsible for any loss or damage caused by irresistible force . . . or from any defects in the packages, barrels, wrappers, or coverings in which the said goods are contained," etc. So, even if the defendants were otherwise responsible, it seems to me that that condition in the contract exonerates them from liability, as any damage caused by the wrapping of the goods is specially mentioned in the exonerating clause.

In my opinion, the true cause of the deterioration of the meat has not been disclosed by the evidence.

The above were the views I expressed at the close of the argument. I reserved my decision for the purpose of looking at the authorities cited. After carefully perusing them, I cannot come to any other conclusion than I did at the end of the trial.

I think the plaintiffs have failed to establish their case, and the action should be dismissed with costs.

BRITISH COLUMBIA.

(FERNIE.)

WILSON, Co. C.J. FEBRUARY, 1906.

RE CAROSELLA.

Liquor License Act—Wholesale Licenses—Limitation as to Number.

Appeal from a decision of license commissioners refusing to grant a wholesale liquor license under the Liquor License Act, 1900.

L. P. Eckstein, for the appellant.

WILSON, Co.C.J., held that if the statutory requirements are complied with, and the applicant certified as a fit and proper person, and no reason against granting the license is suggested, the commissioners are bound to grant it, as there is no limitation under the Act as to the number of wholesale licenses.

BRITISH COLUMBIA.

(FERNIE.)

WILSON, Co. C.J. SEPTEMBER, 1907.

RE HUREL AND HANDLEY.

Liquor License Act — Hotel License Granted by Commissioners — Appeal to County Court Judge — Notice of Appeal—Proof of Decision of Commissioners — Notice Signed by Party Affected by Decision—Proof of Number of Licenses—Trial de Novo—Population of Village —Interpretation of Statute.

Appeal by Hurel and others from a decision of license commissioners granting a retail liquor license to Handley.

A. I. Fisher, for the appellants.

L. P. Eckstein, for the respondent.

WILSON, Co.C.J.:—In this matter certain preliminary objections have been raised, which I will deal with now. The point was first raised that the notice of appeal and proof of service thereof having been presented, and no other evidence being adduced by the appellants, the appeal was not properly before the Court, as there was no evidence of the decision of the Court below. After consideration, I do not think that point well taken. The notice of appeal itself sets forth the decision of the Court below, and, in addition, the Act apparently does not contemplate anything but the notice of appeal having been given. The appeal lies provided the notice of appeal is given, and my view is that the Act has been complied with in this case.

A second point is raised that there is no proof that the notice of appeal is signed by any party affected by the decision of the board. On this point my view also is that the two provisoes deal with a reconsideration by the board, and in that case it must be applied for by some person affected, but the second proviso deals with an appeal, and has no reference to nor is it in any way governed by the preceding proviso. Each proviso is independent and has to be worked out alone.

A third preliminary point is raised that there is no proof adduced by the appellants as to the number of licenses at Hosmer. The contention is that this should be adduced in the first instance. This contention seems incorrect, as the appeal, on being launched, becomes absolutely a trial de novo, and after the applicant proves that he has taken the necessary steps to procure a license, the appellant can then adduce his proof, admitting everything else to be in order. that the full number of licenses have been granted, and that the board has no further power. That is not a fact which the appellant must prove in the first instance, but is rather a ground of defence to be advanced in opposing the granting of a license.

On the merits I am of the opinion that sec. 11a of the Act contemplates an actual population of 1,500 before an additional, or fourth, license can be granted. The power seems to be expressed shortly as follows: "Only 3 licenses can be granted until the population exceeds 500; and thereafter the Act says, as I take it: "Only one license for each additional 1,000 of population." The intent, to my mind, was to give the commissioners power to grant 3 licenses in

small localities up to 500 of a population, which would be sufficient until the population had reached 1,500. The limitation of their power is in the latter part of the section, and the first part must be read as subject to the latter, and that part is the restricting and governing part. Such being my view, I think the appeal must be allowed. The respondent of course is not prejudiced as to any renewal of his application on proof that the population is such as to warrant the granting of the license.

ALBERTA.

OCTOBER 18TH, 1907.

FULL COURT.

ROBERTSON v. TOWN OF HIGH RIVER.

Municipal Corporations—North-West Irrigation Act—Construction of Ditch by Land Owner—Filling up by Municipality—Highway—Dedication—Sale of Lots by Plan—Land Titles Act—Certificates of Title—Authority to Construct Ditch — Conditions — Repudiation—Resolution of Council—Right of Way—Forfeiture—Waiver—Minister of Interior—Territorial Department of Public Works—Orders in Council — Evidence—Presumption—Rebuttal—Appeal—Amendment—Costs.

Appeal by plaintiff from judgment of STUART, J., ante 281.

J. E. Varley, for plaintiff.

W. L. Walsh, K.C., and A. Balachy, for defendants.

The judgment of the Court (SIFTON, C.J., SCOTT, HARVEY, and BECK, JJ.), was delivered by

HARVEY, J.:—My brother Stuart, in his reasons for the judgment appealed from, has set forth the facts so fully that it is unnecessary to restate them here. He has also dealt very exhaustively with the law bearing on the case, and in the main I accept his reasons, without, however, being taken as assenting to any proposition which is not essential

to the case, and to which I have not deemed it necessary to give consideration. I agree with the conclusion that the only right the plaintiff had to use the streets for the ditch was that given by the permission of the Commissioner of Public Works for the Territories, dated 3rd June, 1904, and that she took that right with the conditions imposed. There is a circumstance, however, to which little importance appears to have been attached by the parties, which seems to be of some consequence. It appears from the evidence that on 19th April, 1905, these conditions were in part waived for the time being, by the deputy of the Commissioner, other and less onerous conditions being imposed in the meantime, but no time being fixed for the performance of the original conditions, the particulars of the waiver being set out in a memorandum in the following terms: "Pending further action in the matter of fluming or boxing the (irrigation) ditch, Mr. Stocks considers it advisable that Mrs. Robertson provide such bridges across the ditch, across streets, and in front of lots, to the satisfaction of the overseer, the bridges across the streets to have guards and railing of not less than 14 feet in length (width), bridges to houses be of the size 4 feet wide and of 2-inch plank on stringers of 2 x 6 in edge."

When the municipality of the town of High River was formed in 1906, it assumed the positions of the Commissioner and the overseer as to the control of the streets, and had the right then, as the Commissioner had before, to insist on the original conditions. A reasonable time should then have been allowed for their performance. The object of these conditions was to prevent the ditch being a nuisance. When the acts complained of were done, it was a nuisance, and the municipality had the right to abate it in the manner they did, and I fully agree that the plaintiff's action should be dismissed. I think, however, the plaintiff should have an opportunity, if she wishes, to comply with the original conditions. This conclusion is supported by the decision in Fresno v. Fresno Canal and Irrigation Co., 98 Cal. 179, cited in Long on Irrigation, at p. 125. The defendants by the third paragraph of the prayer of their counterclaim ask that she be required to do this as an alternative to the prayer that she be ordered to fill the ditch up. The trial Judge gave judgment ordering her to fill up the ditch. I think in this respect his judgment may properly be varied.

There is no evidence that the "further action" mentioned in the memeorandum above set out has been taken by the defendants, and the prayer of their counterclaim should not, I think, be treated as such. Before they should be allowed to insist on the performance of the conditions of the license, they should demand such performance, and a reasonable time should be allowed for compliance with the demand. There is evidence, however, that bridges were demanded and refused. In my opinion, the judgment in favour of the defendants should be that the plaintiff forthwith construct the bridges asked for in accordance with the terms of the memorandum, and a declaration that she is bound to construct such other bridges as may from time to time be required by defendants, and to comply with the conditions of the license of 3rd June, 1904, within a reasonable time after being notified by the defendants so to do. As the appellant has failed on all material points, and this modification of the judgment was not asked for, and is one which the plaintiff is not entitled to, as a matter of right, on her pleadings, but is only granted as an indulgence, the costs of this appeal should be paid by her.

ALBERTA.

OCTOBER 18TH, 1907.

FULL COURT.

RE YALE HOTEL LICENSE.

Liquor License Act — Cancellation of Hotel License — Grounds — Fraud — Non-compliance with Provisions of Act—Accommodation Provided by Hotel—Population of City for which License Granted—Limitation of Number of Licenses—Evidence as to Population—Affidavits—Information and Belief—Appeal from Order of Judge Cancelling License—Right of Appeal to Supreme Court en Banc—Jurisdiction—Persona Designata.

Appeal by Robert Mays from an order of HARVEY, J., cancelling a license granted to the appellant for the Yale Hotel,

in the city of Edmonton. On 29th June, 1907, a license was granted for the premises to Mays, which lapsed by statute on the 30th of the same month. On 1st July, 1907, the Liquor License Amendment Act of 1907 came into force. On 29th July, 1907, a license purporting to be a renewal license was granted for the same hotel to the same man. The licensed premises contained in all 22 bed-rooms. There was a door leading from the bar-room into the dining-room, which was nailed fast between the granting of the first license and its renewal. The license of 29th June, 1907, was recommended by two of the license commissioners, each of whom had previously expressed the opinion that the premises were unsuitable for a hotel. Mays's application for the license came first before the Commissioners two weeks previous to 29th June, and was refused by them, the reason given in the report of the commissioners being that the license was not required. Both licenses, of 29th June and 29th July, respectively, were recommended to Mays on condition that Mays transfer the license at once to Richard Secord. The application was, however, made in the name of Mays. The Yale license was the 20th license granted for the city of Edmonton.

The application of Henry Gilbert was for the cancellation of the license under the provisions of sec. 57 of the Liquor License Ordinance on the following grounds:—

1. That it was obtained by fraud.

2. That there was a door leading from the bar-room to the dining-room, contrary to statute.

3. There were only 22 bed-rooms, while the amending Act calls for 45.

4. That the population did not warrant 20 licenses, as it was less than 19,000.

HARVEY, J., on the application for the cancellation of the license of 29th July, without disposing of the other objections raised, directed its cancellation, on the ground that the population was not sufficient to warrant its being granted.

The other points appear sufficiently from the judgments below.

The appeal was heard by SIFTON, C.J., SCOTT, STUART, and BECK, JJ.

C. C. McCaul, K.C., O. M. Biggar, and C. F. Newell, for the appellant.

C. A. Grant, for the respondent (applicant.)

STUART, J.:—The preliminary objection was taken that an appeal does not lie to the Court en banc from the decision of a Judge acting under the provisions of sec. 57 of the Liquor License Act. It was admitted that if Mr. Justice Harvey was acting as persona designata, and not in his capacity of a Judge of the Supreme Court, there would be no appeal. I think it is clear from such cases as Canadian Pacific R. W. Co. v. Little Seminary of Ste. Thérèse, 16 S. C. R. 606, to which we were referred, that a Judge may still be acting as persona designata, notwithstanding the fact that the statute giving the jurisdiction describes him merely as one of a class of persons, and not by words which could apply only to one individual person and to no others. It is, therefore, also clear that if sec. 57 had merely provided for an application to a Judge, without providing any special machinery for bringing the matter before him, there would in such case have been no doubt that Mr. Justice Harvey was acting as persona designata, and that there would be no appeal. The question, however, at once arises whether the provisions of the section which supply this machinery, and which in effect (1) simply fix the clerk of the Court as the person with whom the necessary papers are to be deposited, and (2) simply declare that the notification by means of which the Judge is to bring the parties before him shall be in a specific form, that form being one also specified by the Rules contained in the Judicature Ordinance, do not indicate an intention in the legislature that the Judge shall act, not as persona designata, but in his capacity as a Judge of the Court. The term "originating summons" is not defined by the Liquor License Act, and it is therefore, no doubt, legitimate to assume that the words are to be taken in the sense ascribed to them in the interpretation clause of the Judicature Ordinance. By sec. 2, sub-sec. 4, of that Ordinance, "originating summons" is defined as meaning, in the construction of that Ordinance, "a summons by which proceedings are commenced without writ." If we adopt this interpretation and apply it to the term as used in sec. 57, the result simply is this, that it is provided that the Judge may by means of "a summons by which proceedings are

commenced without writ," investigate and dispose of the matter. It seems to me, however, that a much longer step is taken when we say that all or any of the provisions of the Judicature Ordinance respecting originating summonses must necessarily apply to the summons issued under the section in question. There is nothing in the Act declaring that they shall apply, and we are simply left to an inference to be deduced from the mere use of the term itself that it was the evident intention of the legislature that they should apply. If these provisions of the Judicature Ordinance do not apply, then there was no necessity, for instance, for the seal of the Court to be attached to the summons, and it appears to me to be a begging of the question to argue that because the seal of the Court is in fact found upon the summons, therefore the proceedings must be held to be proceedings in the Court; for, unless they were intended by the Act to be made proceedings in Court to which all the provisions of the Judicature Ordinance would apply, then there was no necessity for the seal to be attached. To my mind, there is nothing but the bare inference which may be made from the use of the term "originating summons" upon which to rest the contention that the proceedings are intended to be in the Court. Other parts of the section, I think, point to an opposite conclusion. The sum to be deposited as security for costs together with the complaint, which is itself an exceedingly small amount if the proceedings are intended to be in Court, with all that that involves, is not to be deposited in the office of the clerk of the Court nor paid into Court, but is to be deposited with a certain person, namely, the clerk of the Court. The complaint is not to be filed in the office of the clerk of the Court, but is to be deposited, with the $10, with the same person. These provisions, it seems to me, point to the clerk of the Court as himself a persona designata, as merely a convenient person with whom the money and papers are to be left, and not as acting in his official capacity as clerk of the Court. There are also the concluding words of the section, which say that the Judge may "award costs in the same way as costs are awarded in proceedings in the Supreme Court." I cannot help thinking that the inference to be drawn from the expressions I have referred to, and also from the use of the word "summarily," to which I shall again refer, and to which sufficient importance has not, I think, been attached.

is at least as strong as the opposite inference arising from the use of the term "originating summons." With respect to the question which was much discussed as to whether an originating summons is an action, I confess that the whole argument, if I may say so, appeared to me to be just a little in the clouds. All the contests over this point which are reported in the cases were contests over the meaning of the word "action" as used in the Judicature Acts and Rules of Court, and as to whether the word as there used in various places was wide enough to include proceedings begun by originating summons. But we are not here interpreting the Judicature Acts or the Rules of Court; we are trying if we can to interpret the Liquor License Act and the terms used in it. I cannot see that much assistance in the question before us is to be derived from decisions which deal with the scope and meaning of the word "action" as used in the English Judicature Acts and Rules of Court. It is said that the result of those decisions is that an originating summons is an action. That may be a short way of putting it, but it must not be forgotten that the real decision was that wherever the word "action" is used in the enactments mentioned, that word will be interpreted in those enactments to include proceedings commenced by originating summons. It seems to me to be a very different proposition to say, where the words "originating summons" are used in our Liquor License Act to describe the method of instituting certain proceedings under it, that, therefore, quite regardless of the context or of the general purpose of the enactment, the proceedings are to be dealt with in every way as an action in our Supreme Court. I should rather be inclined to say that the context in which the words are used and the general scope of the section point to an opposite conclusion, and that the effect and purpose of the section is merely to place an officer of the Court at the Judge's disposal for the custody of the papers, leaving him still persona designata.

But, assuming for the moment that he was not so acting, but was exercising a jurisdiction conferred on him as a Judge of the Supreme Court, and that he was acting as such a Judge, it is still by no means clear to my mind that there is a right of appeal to the Court en banc, unless sec. 9, subsec. 2, of the Supreme Court Act in effect allows one. It may be quite true that if there had been no such section as

sec. 57, or even with the section as it is, an action might have been begun by writ of summons to set aside the license, and that the Court would have had a general jurisdiction to entertain such an action. But this is not the jurisdiction with which we have to deal. A special jurisdiction to proceed in a special way, is created by the Act, and it is given in terms not to "the Court" or to "the Court or a Judge," but simply to "a Judge of the Court." It is clear from the authorities that in such a case original jurisdiction is not given to the Court, and that, unless, again, the Supreme Court Act now allows it, it would not have been competent to the complainant to apply to the Court en banc in the first instance for his originating summons. It is therefore also clear that Mr. Justice Harvey was not acting in any way as the deputy of or as a committee of the Court, which was, I conceive, really the position occupied by a single Judge making orders in Court or in Chambers under the old practice at common law. When the single Judge acted as such deputy or committee, his decision was always open to review. See Kilkenny R. W. Co. v. Fielden, 15 Jur. 191, cited in Re Allen, 31 U. C. R. at p. 491. But, as original jurisdiction is plainly not given by the License Act itself to the Court, as a Court, there can be no right of review, at least on the ground that the Judge was acting as the Court's deputy or committee.

In some statutes the jurisdiction is given to "the Court or a Judge," and in such case the Court would clearly have concurrent original jurisdiction, and therefore also a right of review: In re Allen, ubi supra.

But by a large number of statutes the special jurisdiction is given merely to "a Judge of the Court." In such cases the original jurisdiction is with the single Judge, and not with the Court, and the present Act is, I conceive, one of these cases. The original jurisdiction of the single Judge is not concurrent with an original jurisdiction also given to the Court, but is by the very terms of the Act exclusive, in the sense that the application can be made in the first instance to the Judge and to him alone. The question then arises whether in such a case there is a right of appeal or of review. Now I wish to say at once that while it may be true that the Court might have a very wide jurisdiction if proceedings were instituted by a writ of summons, as seems to have been done in some cases, still I think that it is

impossible for the Court to exercise any such wide general jurisdiction where the proceedings were instituted, as in the present instance, under the provisions of a special enactment conferring a special and extraordinary jurisdiction upon a single Judge; and, furthermore, the attempt to invoke such a wide general jurisdiction in this case is, to my mind, quite inconsistent with the concurrent attempt which is made to limit within very narrow bounds the powers conferred upon the Judge by sec. 57. The real point in the case, it seems to me, lies in this. The legislature has by statute conferred upon a Judge of the Court an original jurisdiction, with summary powers. To what extent is his decision in such a case open to review? The authorities are not absolutely clear, but the conclusion I draw from them is that in such a case there is no right of appeal or of review except where he exceeds his jurisdiction or where he acts in a manner not warranted by the statute conferring the power: In re Allen, 31 U. C. R. at p. 488.

In Kilkenny W. W. Co. v, Fielden, 13 Jur. 191, Parke, B., said: "The matter has been several times before the Courts, and the principle on which they proceed is, that the Court will always review the decisions of a Judge where he is acting merely as its deputy, but not when an entirely independent jurisdiction is given to him by statute."

In the case of Lyon v. Morris, 19 Q. B. D., Day, J., said at p. 142: "Ordinarily speaking, there was not any appeal from the decision of a Judge at Chambers, where he was exercising an original jurisdiction conferred upon him by statute, for he was given summary powers, the exercise of which was not subject to the control of any Court." And in appeal, Fry, L.J., at p. 147, said: "I conceive that from the decision of a Judge acting at Chambers under a statute there would be no right of appeal, unless it were given by the statute." I do not overlook the fact that the actual decision in Lyon v. Morris was in an interpleader case, and that the parties had consented to a decision in a summary way, but a careful consideration of the judgments will, I think, shew that, although the case cannot be treated as a decision in point, yet the general principle was clearly recognized, and that the Judges were, in the passages quoted, laying down what they conceived to be the general rule, quite aside from the special provisions as to finality contained in the Interpleader Acts.

As I have said before, I think sufficient importance has not been attached to the use of the word "summarily" in sec. 57. I am strongly inclined to the opinion that when the legislature provides a method of deciding on any disputed matter "summarily" or "in a summary way," the meaning and intention is that the dispute shall be decided quickly and without delay and therefore finally. If it had been the intention that the proceedings should go on and widen out into a further appeal before the Supreme Court en banc, I think the expression "summarily," which suggests informality as well as the omission of many things which ought to be done before a case can be in proper shape for appeal, would surely not have been used. See Manufacturers and Merchants Fire Insurance Co. v. Atwood, 28 C. P. 21.

However, discussion of this latter point as to the right of review, where original jurisdiction is given by statute to a single Judge, has, I think, been rendered rather useless by the provisions of sec. 9, sub-sec. 2, of our Supreme Court Act. To my mind, the terms used in that sub-section can have no other possible result than to give to the Court a concurrent original jurisdiction in every case in which any statute has heretofore given original jurisdiction to a Judge of the Court alone in his capacity as such Judge, and, therefore, to give to the Court sitting en banc a right of review; and I do not think the fact that the proceedings were actually commenced before Harvey, J., before the Supreme Court Act came into force, can in any way affect this result. The whole question, therefore, depends on the one point whether Mr. Justice Harvey was acting as persona designata or not. I quite admit the strength of the arguments based upon the use of the words "originating summons," as well as upon the giving of jurisdiction to deal with fraud, and it is with great diffidence that I disagree with the opinion about to be expressed by my brother Beck. But I cannot think it is legitimate after all to insert any word in the concluding clause of sec. 57 so as to change its meaning, and I simply feel constrained to say that the inference I draw from the expressions used in sec. 57, particularly the small amount of the security for costs, the word "summarily," and the concluding clause itself, is that the Judge was not intended to act in his capacity as a Judge of the Court, but merely as

persona designata, and that, therefore, in my opinion there is no right of appeal.

However, as to the merits, I prefer not to deal in any way with the question of population of Edmonton, but to rest my conclusion solely on the ground that the provision contained in the first sub-section of sec. 24 respecting the number of rooms, constitutes a condition precedent which the commissioners were bound to observe before recommending the granting of a license.

In the first place I cannot see what conclusion is to be drawn from sub-sec. 1a of sec. 24, which provides that the requirement as to the number of rooms is not to apply to any case where a license has been recommended before the passing of the Act, other than this, that if the recommendation has not been so previously obtained then non-compliance with the provision will prevent the recommendation.

In the next place, to hold otherwise would, to my mind, produce the somewhat peculiar result that the commissioners may disregard the provision in the first instance, and yet be bound under sec. 48 to cancel the license, the next instant, or the next day, if not because the conditions necessary to the granting of such licenses did not exist, which might perhaps be begging the question, at any rate because the licensee is not keeping his premises in accordance with the provisions of the Ordinance. I cannot think that the legislature can be held to have contemplated a breach of their own Act, which would be the necessary consequence if the commissioners were at liberty to grant the license regardless of the provision respecting rooms.

Furthermore, the fact that sub-sec. 1a of sec. 24 enacts that the provision of the first sub-section shall not apply to licenses heretofore in force or recommended, seems to me to draw a clear line of distinction between that first sub-section and the following sub-sections which deal with the general condition of the premises as to cleanliness and safety. I think also my conclusion is strongly supported by the provisions of sub-sec. 2 of sec. 45 respecting premises to be constructed, which, to my mind, are wide enough to cover the case of a building already constructed, but which must be largely added to by way of additional construction before the condition as to rooms can be fulfilled.

Finally, I cannot agree that any inference is to be drawn from the peculiar form in which sec. 24 is worded. It is

said that a hotel must be already "licensed" before the section applied. This proposition amounts to this, that a license may be granted to a hotel with only, say, 5 rooms, and that the next instant, by some magic wand or Alladin's lamp, the other 40 rooms are to spring into existence. For, as I say, the legislature never contemplates a violation of its own Act, and the assumption is that the moment the license is granted the conditions of sec. 24 are fulfilled. To my mind, it is the duty of the board of license commissioners to administer the License Act in a common sense and practical way, and the most practical way that I know of for them to procure observance of the provisions of sec. 24, sub-sec. 1, is to insist that the rooms exist and are visible to their own eyes before they recommend the license. This will save themselves, and possibly the public, a great deal of trouble afterwards. Even assuming, therefore, that there is a right of appeal, I think the appeal should be dismissed.

SIFTON, C.J.:—I concur with the conclusions of STUART, J.

BECK, J.:—A Judge of a Supreme Court of record, when acting in his capacity of a Judge of the Court, and not as exercising an entirely independent jurisdiction conferred upon him by statute, acts as the deputy, or perhaps it may be said as a committee, of the entire Court, and the exercise of his powers when so acting is subject to review by the Court of which he is a member: Bacon's Abr., tit. "Courts" (B); Kilkenny R. W. Co. v. Fielden, 15 Jur. 191.

The same thing is expressed in In re Allen, 31 U. C. R. 485, at p. 493, as follows: "In all cases where the Court alone is mentioned in the statute to do a certain act, and exclusive words are not used, a Judge has power to act as well, because by and through him the Courts commonly exercise their powers. . . . The Court will always review the decision of the Judge when he is acting merely as its deputy, but not when an entirely independent jurisdiction is given to him by statute or when he acts by consent of the parties. Generally speaking, it is meant that the powers of the Judge are to be exercised subject to an appeal to (review by) the Court."

In various statutes authority is given to a Judge to exercise certain powers. In a number of such cases it has

been held that the decision of the Judge, except where his decision is merely the exercise of a discretion, is subject to review by the Court of which he is a Judge: Teggin v. Langford, 10 M. &. W. 556, 12 L. J. Ex. 76. But it appears that this proposition is limited to cases in which the matter referred to a Judge is a proceeding incident to a matter otherwise before the Court.

We are brought then to the question whether Mr. Justice Harvey, in exercising his jurisdiction under sec. 57 of the Liquor License Ordinance, was doing so merely as persona designata, that is, was exercising an entirely independent statutory jurisdiction, or was doing so as one of the Judges of the Supreme Court acting as deputy of the Court.

If the learned Judge was acting in the latter capacity, I am unhesitatingly of the opinion that his decision is subject to review by the Court in banc.

Section 57 is as follows:—

"LICENSES IMPROPERLY OBTAINED.

"57. If, within 60 days from the granting of a license or a transfer of a license, any person deposits with the clerk of the Supreme Court for the judicial district wherein the licensed premises are situated, $10 as security for costs, together with a complaint (verified by affidavit) that the said license or transfer has been obtained by fraud or in violation of any of the provisions respecting licenses, on application the Judge may by means of an originating summons investigate and summarily hear and dispose of the complaint, and may direct the cancellation of the license or dismiss the complaint, and award costs in the same way as costs are awarded in proceedings in the Supreme Court."

On a careful consideration of the language of this section and of a number of decisions, I have come to the conclusion that a Judge exercising jurisdiction under it does so not as a designated person but as a deputy of the Supreme Court.

I give briefly my reasons for this conclusion. I consider first the meaning to be attached to the expression "the Judge." By sec. 2, sub-sec. 15, the word "Judge," unless such interpretation be repugnant to the subject or inconsistent with the context, is to be construed to mean "a Judge of the Supreme Court usually exercising jurisdiction in the

judicial district in which the license district, or the greater portion thereof, is situate."

The words "usually exercising jurisdiction in the judicial district" are, as a matter of history, taken from the Act which constituted the Supreme Court of the North-West Territories, 49 Vict. ch. 25, sec. 18 (1886), which enacts; "Every Judge of the Court shall have jurisdiction throughout the Territories, but shall usually exercise the same within the district to which he is assigned by the Governor in council."

Ordinance number 6 of 1893, sec. 7, enacts: "The Supreme Court presided over by a single Judge for the transaction of the business of the Court may sit and act at any time and place in each judicial district as any Judge usually exercising the jurisdiction of the Court within such district appoints."

The practice of assigning Judges to a particular judicial district was, it appears, abandoned before the appointment of any of the Judges now residing in the province of Alberta. I am, therefore, of the opinion that the words "usually exercising jurisdiction in the judicial district in which the license district, or the greater part thereof, is situate," must be wholly disregarded as being introduced under a mistake of fact, leaving the interpretation clause to read "'Judge' means a Judge of the Supreme Court," or perhaps the interpretation clause may be taken as inapplicable to sec. 57, in which event it seems to me clear that the expression "the Judge" can only be construed as meaning any Judge of the Supreme Court, that Court being previously mentioned in the same section. I do not find that an "originating summons" is defined elsewhere than in the Judicature Ordinance. By the Judicature Ordinance (C. O. 1898 ch. 21), sec. 2, sub-sec. 4, it is defined to mean "a summons by which proceedings are commenced without writ." Order XI. deals at some length with applications by means of an originating summons, and Rule 470 under that Order provides that "an originating summons shall be sealed by the clerk." Reverting, then, to sec. 57, we find it provides for the filing of a complaint in the Supreme Court and an application to any Judge of that Court for an originating summons, that is to say, a summons sealed by the clerk of the Court, by which proceedings are commenced without writ, in which proceed-

ings the Judge is to try, amongst other things, questions of fraud.

These considerations lead me to the conclusion that the proceedings to be taken under sec. 57 constitute an action: (Judicature Ordinance, sec. 2, sub-sec. 2), and a "cause" (Judicature Ordinance, sec. 2, sub-sec. 1), in the Supreme Court, notwithstanding the implication to be drawn from the concluding words of sec. 57, "and award costs in the same way as costs are awarded in the proceedings in the Supreme Court." I think they must be read as if the word "other" preceded the word "proceedings."

In Canadian Pacific R. W. Co. v. Little Seminary of Ste. Thérèse, 16 S. C. R. 606, a Judge of a Superior Court acting under the Railway Act was held to be acting as persona designata, because, as said by Patterson, J. (after listing a number of administrative powers), the functions to be exercised are functions which from their nature and object must be intended to be exercised in a summary manner, and not liable to the delay incident to the appeals from Court to Court. Re Toronto, Hamilton, and Buffalo R. W. Co. and Hendrie, 17 P. R. 199, merely accepted the decision of the Supreme Court as conclusive.

In Re Pacquette, 11 P. R. 463, a Judge of a County Court, acting under the authority of an Act providing for removal of assignees for creditors and substituting other assignees, was held to be persona designata, because "the subject of the statute is not of a contentious or litigious nature," and because the matters referred to the Judge are not judicial proceedings or in the nature of judicial proceedings. Re Young, 14 P. R. 303, and Re Simpson and Clafferty, 18 P. R. 402, were similar decisions upon the same Act.

The principle seems to be that a Judge will be held to act as persona designata when the statutory authority conferred upon him (1) is not connected with a proceeding in the Court of which he is a Judge, and (2) is for the exercise of powers which are merely ministerial or administrative of the special machinery provided as incidental to the working out of a legislative code relating to some special subject, such as railways or land titles, and, if judicial in their character, are primarily administrative and only secondarily incidentally or occasionally judicial.

Having decided that there is a right in this Court to review the decision of the Judge acting under sec. 57, I pro-

ceed to consider the extent of the power which, in my opinion, it was intended the Judge should have jurisdiction to exercise. The investigation is to be on the question whether or not "the said license or transfer has been obtained by fraud, or (obtained) in violation of any of the provisions respecting licenses."

After an examination of all the material considered by the Judge, I fail to find fraud established. The question remains, was the license of 29th July obtained in violation of any of the provisions respecting licenses. The provisions respecting licenses intended in the section under consideration must, in any case, be confined to the provisions referring to the time contemporaneous with and prior to the moment at which the license is issued, or, to use the word of the section, "obtained."

These provisions fall under four classes:—

1. Those which enact that "no license shall be granted, etc., and any license so granted shall be void," e.g., sec. 13, sub-sec. 5: sec. 20; sec. 21.

2. Provisions which enact that "no license shall be granted," etc., but without the addition of words to the effect that any license so granted shall be void," e.g., sec. 22; sec. 23; sec. 23 (a); sec. 37 (1); sec. 37 (3).

3. Provisions not prohibitory in form and not referring directly and substantively solely to the license, but only indirectly and adjectively, e.g., sec. 24, "Every licensed hotel shall contain . . . in cities at least 45 bed-rooms." (2) Shall have two public sitting rooms separate and distinct from the bar-room. (3) Shall be provided with suitable and sufficient appointments and appliances for serving meals daily to travellers. (4) Shall be provided with suitable privies, to be approved by the inspector, which shall at all times be kept clean and ventilated. (8) Shall be provided with suitable fire escapes and fire alarms, signals to be approved by the inspector, and in places having a fire brigade by the chief of such brigade.

4. Provisions relating to the procedure of the applicant, objectors, inspectors, and board, on the application for the license.

Section 15, relating to the limitation of the number of licenses by population, I would place under the second class. The first sub-section reads: "The number of hotel licenses to be granted in cities, etc., shall not exceed," etc.: the

second sub-section, "No wholesale licenses shall be granted in cities, etc., unless and until," etc. I think the fair construction of each sub-section is that it is prohibitory.

Are all these very different classes of provisions intended by the words "provisions respecting licenses" in sec. 57?

After very careful consideration of the Ordinance, I have come to the conclusions: (1) that these words refer only to the first and second classes of provisions as I have listed them, among which, as I have said, I place sec. 15, relating to population: that is, that the Judge, acting under sec. 57, has jurisdiction to "direct the cancellation of the license" on the ground of fraud (in which I think is included fraud on the part of the commissioners, though the applicant were not shewn to be connected with it), or on the ground of a violation of the prohibitory clauses of the Ordinance: (2) that violations of the provision of the third class are intended to be dealt with on subsequent application by the board under sec. 48, or the Attorney-General under sec. 49, that is to say, they are to be dealt with not by a judicial officer bound on the finding of the fact of even a slight or technical breach of any of these provisions, though occasioned by accident or mistake of law or fact, to direct the cancellation of the license, but by a non-judicial body or person, not so bound, but at liberty to accept a substantial compliance, or to permit of an opportunity to remedy the accident or mistake; and (3) that violation of the provision as to procedure, whether laid down in the Ordinance or dictated by the principles of natural justice, are to be met by mandamus, prohibition, or other extraordinary remedy. I have come to the foregoing conclusion after having referred to the cases of Miles v. Rogers, 36 N. B. R. 345; Regina v. Wilkinson, Ex p. Duguay, 37 N. B. R. 90: Regina v. Wilkinson, Ex p. Cormier, 37 N. B. R. 53; and some decisions of the British Columbia Courts.

Harvey, J., has informed us that his order was in fact based on the ground that there was not a sufficient population in the city to justify the granting of the license, without considering whether he might or might not have based it upon other grounds. Apart from fraud, which, as I have said, I do not find to have been established, I am of the opinion, for the reasons I have given, that of the grounds stated in the complaint, the only ground which the Judge had jurisdiction to investigate was the question of popula-

tion. Objection was taken on the argument that a number of the affidavits filed or passages contained in them should be disregarded as constituting no evidence, because they purported to give what was at best secondary evidence, or because, if the proceedings are interlocutory, they were statements on information and belief without a statement of the grounds of belief, and, if not interlocutory statements on information and belief, even with the grounds of belief, are not admissible. I think secondary evidence is admissible and must be accepted as sufficient unless it be objected to on that ground when tendered.

I think the proceedings before the Judge were not interlocutory, and that therefore statements on information and belief, even with a statement of the grounds of belief, should have been disregarded, even though not objected to (Jacker v. International Cable Co., 5 Times L. R. 13), subject to this, that if a trial, hearing, or argument proceed upon the virtual recognition by the representatives of both parties of the existence of certain facts, whether those facts be brought to the notice of the tribunal by proper or improper evidence, or mere statement of counsel, or otherwise, the existence of such facts will be taken to be admitted: see Gilbert v. Endean, 9 Ch. D. 259.

Harvey, J., informs us that there were certain affidavits which were tendered by the respondent as evidence in rebuttal, bearing on the question of population; that they were objected to on the ground that they were not proper evidence in rebuttal, but were conformatory of the appellant's case; that he received them, reserving the question whether he would admit them or not; that he disregarded them solely on the ground that, in his opinion, there was sufficient evidence to satisfy him that the view contended for by the respondent on the question of population was correct, but that had he not so found he would, in the exercise of his discretion, have admitted them. Under these circumstances, I think we should admit them here, so far as they are not open to any of the objections which have been made and sustained with regard to the other affidavits before us. On the question of population, my rulings upon these objections will exclude from my consideration all statements upon the question, except those made by the census takers engaged by the respective parties. I think their direct and distinct statement of the fact that they ascertained certain figures

by inquiry at the different places of habitation in the city are, though hearsay, admissible as evidence, because "it must be resorted to from the very nature of the thing" and is "the best evidence which the nature of the case afforded:" Averson v. Lord Kinnard, 6 East 188, at pp. 195 and 197, a case of a patient's statement as to her state of health, to which I think the present case is analogous.

As to the population, the question was: Was the population of Edmonton on 29th July, 1907, less than 19,000? And the onus of satisfying the Judge and this Court that it was less than that number, was upon the respondent.

In my opinion, our duty in this Court, sitting in review in such a case as this, where all the evidence is by affidavit, and where, therefore, the Judge was in no better position than ourselves, is to draw the inferences of fact which we deem proper, unrestrained in any way by the findings of the Judge.

I deal with the evidence given as to population as follows. The affidavits which Harvey, J., disregarded, give as the population certain figures ascertained by census takers working in different districts on dates between 23rd September and 4th October. With one exception, all the affidavits are in the same form, and, after stating the taking of the census, contain the following words: "That during the said dates I made a full and complete canvass of every house, tent, or other place within the said district above described where it was possible that there might be people living, and I found that the population of the said district at that time was and I verily believe that the population of the said district does not exceed the said number."

In my opinion, the deponents in swearing to the "population" were swearing to a conclusion of law: they should have stated the facts and left it to the judicial tribunal to which the affidavits were to be presented to draw the conclusion of law. On this ground I would reject all these affidavits, and the excepted one to which I refer is not made by the census taker but by another person on his report, and should, for that reason, also be rejected.

This leaves as being, in my opinion, the only admissible evidence of population the affidavits of the census takers engaged by the appellant, and they fail to convince me that the population on 29th July was less than 19,000.

In coming to this conclusion I point out that there are some ambiguities in these affidavits. The affidavits were filed, as has been stated, by the appellant, but, inasmuch as I hold them to constitute the only evidence on the question of population, and the onus is on the respondent, it seems to me that the ambiguities must be solved in favour of the appellant.

Furthermore, in coming to this conclusion, I have done so having the view that "population," as intended by the Liquor License Ordinance, is the totality of people ordinarily present in the locality under ordinary conditions during the business hours of the day.

In the taking of a governmental census extending over a very large territory, it would be a matter of indifference whether the census were taken with reference to the day or night, because the individuals would in any case be counted in some locality.

In my opinion, for the reasons I have given, the order of Harvey, J., should be set aside. I would, however, give no costs.

SCOTT, J., agreed with BECK, J.

ALBERTA.

HARVEY, J. OCTOBER 22ND, 1907.

CHAMBERS.

RE CITY OF EDMONTON AND CANADIAN PACIFIC R. W. CO.

Assessment and Taxes — Property Purchased by Railway Company for Right of Way, but not Used as such—Assessment as of Lands of Private Owners.

Appeal by the railway company from the decision of the Court of Revision for the city of Edmonton, confirming the assessment of certain property owned by the railway company in the city.

R. B. Bennett, for the company.

J. C. F. Bown, K.C., for the city corporation.

HARVEY, J.:—The property in question was purchased for the purpose of being used as a right of way, and a plan of such right of way has been recorded in the land titles office, as required by the Railway Act. In the meantime such portion of the property as has buildings on it is rented, the rents being paid to the railway company. It is contended on behalf of the railway company that the property should not be assessed at more than $1,000 a mile, in accordance with the terms of the Ordinance respecting the assessment of railways, being ch. 71 of the Consolidated Ordinances of 1898, or that in any event it should not be assessed for a higher sum than was paid by the compony when purchasing it. it being so purchased for the purpose of a right of way, and being thereby impressed with a certain trust.

As regards the first point, it appears to me quite clear that the provisions of the Ordinance in question do not apply to land in the position of this land. The terms of the Ordinance are, "the roadway and the superstructure thereon." It is quite clear that the land in question is not at present a roadway, and, of course, has no superstructure such as is contemplated by the Ordinance. I can see no reason why that Ordinance should be looked to, therefore, at all. The land is not at present a right of way, and may never become such, and, until it does become such, I think the Ordinance can have no application, either directly or indirectly.

I also can see no reason why the price paid should be taken as a basis for the amount of the assessment. Title XXXII., sec. 3, of the Edmonton charter (ch. 19 of 1904), to which the appellants call attention, provides: "Land shall be assessed at its fair actual value. In estimating its value, regard shall be had to its situation and the purpose for which it is used, or, if sold by the present owner, it could and would probably be used in the next succeeding 12 months." This land is at present used, as has been indicated above, in the same way as the land of any ordinary owner; the portion of it that is remunerative is bringing in a revenue to the owners; the portion which is unremunerative is lying idle. The assessor simply assesses it the same as any other land in the neighbourhood, and no objection is taken to the amount of the assessment, except that it is fixed

on a wrong basis. I see no reason, however, why any other basis should be adopted than that which has been adopted, viz., of assessing the land at its fair value without reference to the purpose for which it is ultimately intended to be used. The appeal, therefore, will be dismissed and the assessment confirmed.

ALBERTA.

HARVEY, J. OCTOBER 29TH, 1907.

CHAMBERS.

CLINTON v. SELLARS.

Injunction—Interim Order—Action to Set aside Settlement —Right to Injunction—Form of Order—Scope—Parties —Costs.

Motion by defendant to dissolve an injunction.

C. C. McCaul, K.C., for defendant.

C. A. Grant, for plaintiff.

HARVEY, J. (oral):—There were several objections to the injunction, which was granted ex parte. The first objection was that it was irregular in form and should on its face have been only an interim injunction. This objection was admitted to be a valid one, and it was admitted that the injunction should be amended in that respect. Then it was urged that there was no precedent for granting an injunction in an action such as this to set aside a fraudulent settlement. I find in this Court an interim injunction such as this has been granted. Revillon v. Derome is one case, and I find also reported the case of Gibson v. Head, 17 W. R. 986, in which an injunction was granted in an action by a creditor to set aside a fraudulent preference, as it was alleged to be—a fraudulent settlement. The report in that case is somewhat confusing, but that much of it appears clear. The defendant had fraudulently obtained administration of an estate, and he had settled part of the estate on his wife. The action was brought by a sister of the defendant, who was a

creditor, to have it declared that the settlement was void as against creditors, and she also asked for a declaration that the property was not his. That does not appear to have been consistent with the first prayer. However, the injunction was granted to restrain the disposition of the property, pending the trial of the action. I think, therefore, there is ground for an injunction in such a case as this. The plaintiff is not a simple contract creditor, but has a judgment and execution against the husband of the defendant in this case, and he asserts that this particular property is the property of the husband, and should be available for the satisfaction of the judgment which he holds. If this property could be disposed of pending the trial of the action, the whole result of the action would be fruitless, because he would have no remedy against the defendant. He does not claim any redress against her. All he claims in the action is to have access to this particular property to satisfy a debt of another person for which he has judgment.

It was urged also that, being a subsequent creditor, conditions have not been shewn which would establish his right to protest against this settlement. It appears to me that a certain portion of the evidence was not sufficiently considered in this respect.

In the examination for discovery in aid of execution of the husband he was asked why he had signed the agreement for the sale of the hotel property. Objection was taken by his counsel to answering that question, he stating that he had signed it because he had an interest, being the holder of the license. To my mind, that statement by counsel is the same as the sworn statement by the party being examined, that he had an interest in the property. Therefore he had an interest in the proceeds of which this mortgage is part. The plaintiff was at that time a creditor, so that in that view of the case he would not be a subsequent creditor at all; he would be a prior creditor; and that objection, therefore, would not be applicable, to my mind, to these proceedings.

There was a further objection that some of the persons who were enjoined were not parties to the action, and could not properly be enjoined. It seems to me that this objection can not be supported in this case. The injunction is against them not for any substantive reason. There was no reason

why they should be made parties. Nothing is claimed against them, and the injunction against them is merely to give effect to the general injunction to restrain the disposition of the property or its being used pending the trial of the action, and is thus only auxiliary. Moreover, I am of opinion that they are the persons who should object to that if it is to be objected to. The defendant is unquestionably affected by that injunction against them, but her objection is not to their being enjoined, but that they are enjoined, not being parties. If the plaintiff had made them parties, and then enjoined them, that objection would not be open to her at all, and I think they are the only ones who should be entitled to take the objection that they are not parties, though being enjoined.

There are some other objections which I do not think it is necessary for me to deal with specifically, as I do not think they are sufficient to set aside the injunction generally. But to come to the question of the merits of the injunction, it is pointed out by the defendant that this is the only property she has on which she relies for the support of herself and family. The plaintiff does not sue on his own behalf as well as on behalf of other creditors, nor does it appear that there is any other creditor. His claim is for $457, and he has by his injunction tied up the mortgage of $9,500 and interest. It appears to me that is entirely unnecessary for his protection, and that a very much smaller amount would amply protect him. I direct, therefore, that upon $700 being paid into Court—I am not limiting it to the mortgagors paying into Court, and if for any reason the defendant wished to pay it into Court, she might do so—the injunction will be dissolved. Thus only the smaller portion of the first instalment of principal and interest would meet the requirements of the injunction, and the remainder would be available for the defendant's personal use. The injunction order will be varied, therefore, in these two respects.

The only question left to consider is the question of costs. As to the first point, the injunction being irregular, the defendant would undoubtedly be entitled, I think, to the costs of an ordinary motion limited to that. She has, moreover, succeeded in very substantially reducing the scope of the injunction, and I think therefore she should have the costs of the motion generally. The costs therefore will be to the defendant in the cause in any event.

YUKON TERRITORY.

OCTOBER 1ST, 1907.

FULL COURT.

PALMGREEN v. TABOR.

O'FALLON v. PATTON.

Mines and Minerals—Grant of Placer Mining Claim—Renewal—Representation Work—Sufficiency—Cancellation—Relocation — Staking — Evidence—False Affidavits in other Cases—Inadmissibility.

Appeal by the defendant Tabor in the first case and appeal by the defendant Patton in the second case from a judgment of the Gold Commissioner of the Yukon Territory, pronounced in these cases on 20th April, 1907, the two cases having been tried together by consent, whereby it was adjudged that the representation work required to be done in order to entitle the defendant Tabor to a renewal grant of creek claim No. 74 below discovery on Sulphur creek, in the first case, and in order to entitle the defendant Patton to a renewal grant of the lower half of creek claim No. 72 below discovery on Sulphur creek, in the second case, was insufficient, and ordering that the grant of the placer mining claim issued to defendant Tabor in the first case on 7th December, 1906, be cancelled, and that the application of the plaintiff for grant of creek claim No. 74 below discovery on Sulphur creek be granted; and ordering that the grant for the placer mining claim issued to the defendant Patton in the second case on 7th December, 1906, be cancelled, and that the application of the plaintiff for a grant of the lower half of creek claim No. 72 below discovery on Sulphur creek be granted.

The appeal was heard by DUGAS, CRAIG, and MACAULAY, JJ.

F. T. Congdon, K.C., for appellants.

George Black and F. J. Stacpoole, for respondents.

MACAULAY, J.:—Creek claim No. 74 below discovery on Sulphur creek and the lower half of creek claim No. 72 below discovery on Sulphur creek, creek claim No. 73 below discovery on Sulphur creek, and creek claim No. 73 A below discovery on Sulphur creek, were grouped for representation purposes in the fall of 1906.

Creek placer mining claim No. 74 below discovery on Sulphur creek would have expired at midnight on 27th November, 1906, if the renewal work was not done, and creek placer mining claim No. 72 below discovery on Sulphur creek would have expired at midnight on 1st December, 1906, if the renewal work had not been done.

Shortly after midnight of 28th November, 1906, creek claim No. 74 was restaked by the plaintiff Palmgreen, and shortly after midnight on 2nd December, 1906, creek claim No. 72 by the plaintiff O'Fallon in the second case.

For the same reasons in law expressed by me in Hocking v. Wenzel, ante 658, I do not think these two claims when they were restaked respectively by the plaintiffs on 28th November, 1906, and 2nd December, 1906, were vacant Dominion lands and open for occupation and relocation by a miner, within the meaning of the provisions of the Yukon Placer Mining Act, and for these reasons I am of opinion that the appeal in each of these cases should be allowed.

In these cases also it was contended that not sufficient assessment work had been done by the agents of the defendants who were engaged to perform the work. They were the same Ballentine and Brown who had performed the work for the defendant Wenzel in Hocking v. Wenzel, and it is admitted that they had been employed to do assessment work on several claims on Sulphur creek in the fall of 1906.

I may say that the defendant Tabor is the only appellant in the one action, and the defendant Patton the only appellant in the other action, so consequently the rights of the defendant John L. Lemmel in the one action and William Croteau in the other action have not to be considered.

There was a great conflict of evidence in these cases as to whether or not the proper assessment work had been done, and as to whether or not it could have been done within the time stated by Ballentine and Brown that it was done, and as to whether or not it was easier to sink shafts and run tunnels on Sulphur creek than it was on Bonanza or some other creeks in this Territory. I must say there was a great

conflict of evidence on every point, and it is difficult to come to a conclusion as to who was really telling the truth, or whether the persons who attempted to give evidence sufficiently informed themselves of the facts to enable them to speak definitely and with assurance in regard to the matters upon which they attempted to give evidence.

It was also shewn that there was carelessness in making affidavits on the part of Ballentine and Brown, and also carelessness on the part of the commissioner for taking affidavits, who was the mining recorder on Sulphur creek, Ralph P. Smith, who, in several instances, apparently made a mistake in the jurat by stating therein the wrong month in which the affidavits were taken before him.

The Gold Commissioner gave great weight to Smith's evidence, because he stated that he was on a certain claim on 22nd November; not the claim in question, but another claim upon which Ballentine and Brown were doing assessment work; and they had stated that they had put a shaft down there on 21st November, and Smith states that on 22nd November, when he visited the claim, he saw a boiler and the pipes for thawing, but saw no shaft.

Taking the whole of the evidence offered in these cases, the onus being on the plaintiffs in each case to properly prove their claims, I do not think, if I were called upon to give a judgment on the facts, I would come to the same conclusion at which the learned Gold Commissioner has arrived, but, owing to the view I have taken on the law, it is unnecessary for me to discuss that point further.

Another matter that was argued before us was, that while application for grouping was made on 16th November, 1906, it was not really granted until 6th December, 1906, and that in the meantime the claims had elapsed. It is not necessary now for me to discuss that point, but if it were necessary to consider it, I think that sec. 49 of the Placer Mining Act, which provides that "no rights of any person owning or applying for a claim shall suffer from any acts of omission or commission or delays on the part of any official appointed under this Act," fully protects the defendants against the lapse of these claims in the meantime before the grouping certificate was granted, and that when it was granted it related back to 16th November, the time the application for it was made.

For all the above reasons, I am of the opinion that the appeals in these respective cases should be allowed with costs, and that the judgment of the Gold Commissioner should be reversed with costs.

CRAIG, J.:—The first of these cases affects claim number 74 below discovery on Sulphur creek, and the second affects claim number 72 below discovery on Sulphur creek.

The reasoning for my conclusion in this case is very similar to the reasoning in the former case of Hocking v. Wenzel. The action is one of the same nature, namely, to set aside a grant given to a staker or relocator on the default of the owner to perform his representation work under the Placer Mining Act. The evidence is that the claims expired at midnight on 27th November in the one case, and on 2nd December in the other. The stakers applied to file their applications, deposited their fee, but the renewal grants were given to the original owners. These grants the Gold Commissioner ordered to be cancelled, and grants issued to the relocators.

Mr. Gosselin is the first witness, and he says that the schedule which was adopted by the office on which the work was allowed was the schedule of 1901. This schedule provides that so much shall be allowed for a certain depth, and, as the depth becomes greater, a certain other rate per foot shall be allowed for the work, and by these means the quantity of work and its value is placed by the office upon a fixed basis. It appears that the schedule was settled in 1901. In September of 1906 a new schedule was prepared and advertised, but on representation was rescinded, the rescinding not being carried out in the regular manner in which the schedule was adopted by the Commissioner of the Territory and the Gold Commissioner, but was rescinded, and that all the mining recorders were notified to that effect, and the old schedule remained in force until 1st January of this year, that is, it was acted upon in the office exclusively. The respondents contend that the new schedule having been adopted under the Act, with the formalities required, and not being rescinded by the same formalities, remained, de jure, the schedule, and miners were bound by it. I have dealt with that in my former judgment, and will not deal with it here.

The next witness in this case is Palmgreen, the staker of 74. He says he used old stakes, put them in a few feet from the base line, blazing a little piece above the line of the snow at the bottom of the stake; that he was staking for one Stahl, who examined the records and told him when the claim would expire; that he was some 15 or 18 feet from the base line; by other witnesses it appears he was nearer to the base line than that—some two or three feet from the base line. He says he will not swear to the width of the blaze, and that he might have written his name "R. Palmgreen" and not in full. He says he does not think he knew how to stake, but that Stahl, who was with him, did.

Lawrence is the next witness called. He saw Palmgreen's posts Nos. 1 and 2 near the trail so as to be seen from the base line, and O'Fallon's stakes he also saw near the base line, and they were proper posts, but will not swear to the width of them nor to the size of the blaze; O'Fallon's posts were new posts, and in recording he used his initials only. Stahl, the next witness, being the virtual plaintiff in the action, says that he saw Palmgreen stake on the night of 27th November at midnight, and on the base line or a foot or two off it; that Palmgreen used old stakes, that they were of the proper height, 4 inches square and signed "R. P. Palmgreen;" that he measured the work done, and it was only 19½ feet; he measured it by means of dropping a coal-oil lantern down into the shaft; that he could see plainly that there was no drifting; that one Clark was with him and measured the cord with a tape-line after he hauled up the lantern. Clark did not drop the lantern into the hole and only took Stahl's word for the point up to which to measure the tape; so that there was really only one measuring of the depth of the hole, that is, by Stahl, the virtual plaintiff; that on 15th December he again went down with Corporal Smith and one Shoop; that in the meantime the hole had filled with water, and it was covered with ice about 12 feet from the top of the hole; that they found there a dump which measured 25 by 15 by 2½ feet in depth, and there was some waste matter thrown over the bank. Speaking of O'Fallon's staking, he staked after midnight on 1st December; he examined the claim, and no work had been done; that O'Fallon staked by signing his initials only and not by signing his full name; and that at the time that Stahl and Palmgreen were there there was a windlass on the

ground, with a steam pipe running from a boiler that had been used that day on the work. So that it appears that Stahl and Palmgreen and O'Fallon were taking advantage of the non-compliance of the owner with the statute in regard to performance of work, and that the owners were in actual possession of the claim and doing work on it, it may be said, at the very time the staking took place or within a few hours before it. Stahl says he searched in the records and found no grouping certificate under the Act, which provides as follows, sec. 51: "Upon application being made to him by any person or persons owning adjoining claims, the mining recorder may, with the approval of the Commissioner, grant permission, for a period not exceeding 10 years, to any such person or persons to perform on any one or more of such claims all the work required to entitle him or them to a renewal grant for each claim so held by him or them, provided that before any such permission is granted the government mining engineer shall furnish a report on the application, and where the application is made by more than one person the applicants shall file with the mining recorder a deed of partnership creating a joint liability between the owners of the claims for the joint working thereof." Stahl says he searched in the records to see if any grouping certificate had been issued, and there was none. As a matter of fact a certificate did not actually issue until after the work had been performed, although an application had been made and filed before the work had started, but the granting of the certificate was delayed for the furnishing of certain evidence required by the Commissioner as to the right of the parties under certain powers of attorney to represent certain of the owners, and when the certificate was granted it was dated back to the date of the application, and it was intended by the Commissioner that the certificate should apply to the work for the year in question for which the application to group was made. Clark is called as a witness and confirms the former evidence. He did not measure the hole, but simply measured where Stahl shewed him to measure. Shoop is called and he says he went with Leuchan and Hawkins on 22nd December and with Stahl and Corporal Smith on the 15th, to measure this hole; that he found water in the shaft within 12 feet of the top, and could not see the bottom of the shaft, of course, but he dropped a weight down with a string into the water

through the ice, and that he judged of the depth by the weight striking what he supposed was the bottom and found the bottom at 21 feet. He gives evidence as to the impossibility of the parties to perform the work which they said they performed and swore to; that is, within the time within which they say it was performed.

Corporal Smith, who was sent to examine the claim, gives evidence that he saw this dump which was taken out, but he did not measure the hole before the filling up with water and ice. He further says that on the date when the parties say they had done this work, namely, 22nd November, he passed by the place and saw no signs of any work being done or dirt taken out. Patton, the virtual defendant, gives evidence as to his applying for a grouping certificate on 16th November, that he employed Ballentine and Brown to do the work, that he was paying them by the hour, that they were not limited to time, but had instructions to perform the work according to the schedule which he gave them before the specified day, and he had reason to believe that they would do it; that they did do it, and that he paid them for doing it.

Ballentine, who was in charge of the work, was called as a witness. He gives evidence that he sank 31 feet, and drifted 56; that it was impossible after the hole filled with water to see the drifting; that the drifts were started some 4 or 5 feet from the bottom of the shaft then sunk into bedrock, and that it would be very easy for one dropping a lantern down into a hole such as that, on a dark night, to entirely miss seeing the openings to the drifts running from the shaft; that the shaft itself was irregular in shape, caused by projections here and there down the sides, owing to the nature of the soil it penetrated, and that no one could see the drifts by dropping a lantern to the bottom. This, I may say in passing, seems perhaps reasonable, because, if Ballentine's story is true, that the drifts were started not at the bottom of the shaft but a few feet above the bottom, then one dropping a lantern down the shaft would not be looking for the drifts where they were a few feet above, and that a person dropping a lantern down to search for drifts might overlook them entirely, not expecting to find them above but at the bottom, and he might not see them owing to the shadows cast by the projections on the side of the shaft. Again, Stahl was certainly not looking for drifts when he went there. He expected to find simply a shaft. He does

not say anywhere that he had heard that drifts were sunk; he does not go into the shaft itself. The only measurements which he takes and the only evidence which he pretends to give for the purpose of depriving these men of their property is a very cursory examination, lasting from 3 to 5 minutes, by dropping a lantern down a shaft at midnight. Whether or not these drifts were ever run, as Ballentine and the workmen swear, from the shaft, can never be ascertained without a pumping out of this shaft, and perhaps not even then, as the dirt may have fallen down. Ballentine swears to the drifting, and, if his story is correct, then he did sufficient work under the schedule of 1901 to entitle the owner to renewal. Ballentine swears that he came out of his cabin when Stahl was there staking with Palmgreen and offered to let them go down in the shaft and to shew them the drifts, and Stahl refused to go down. Stahl denies this. In this evidence Ballentine is confirmed by Brown, both as to the size of the of the shaft and the drifting and the offer he made to let Stahl go down and inspect the shaft and the drifts.

Now, as to the stakings, Ballentine and Snell go for the purpose of measuring these stakes and examining them principally for the purpose of giving evidence, and they took notes at the time, which notes they produced in Court, and from these notes it apears that O'Fallon's stake was 3 feet 11 inches, high, 4 inches on the face, half an inch thick on one side, and an inch thick on the other; that the notice was signed by initials, and not by the full Christian and surname; that on one of the stakes the writing was so faint as to be almost illegible, and O'Fallon's name could not be made out except by reference to the lower stake, which shewed the name; that the other or the lower stake was only 2¼ inches wide at the blazer, and was only 2½ inches in diameter. Referring then to Palmgreen's stakes, number 1 was signed "R. Palmgreen" and not in full; it was an old stake, 3 feet 6 inches high, and squared 3 inches; that it was an old post, and blazing had been done down near the bottom of the post and near the snow, and there the writing was put claiming the staking; that No. 2 post on the same claim was also signed "R. Palmgreen" and not in full, and that it measured 2½ inches on the face, and was marked, as the other one, with a notice near the bottom and not more than 3 inches above the snow; these posts were near but not on the base line. Whatever doubt there may be thrown upon

the evidence of Ballentine by the cross-examination, there can be none as to the evidence of Snell, so far as I can see, and no suggestion of doubt as to his evidence is made by the Gold Commissioner. He had his notes, and all the evidence in answer to the evidence of these notes given by Stahl and the other stakers is most indefinite and cannot be relied upon; even they themselves are not sure, in giving their evidence, as to the sizes of the posts. A good deal of carelessness is shewn all through, both in regard to the staking of these claims and in the taking of the affidavits by the men who did the work. Brown, as I said before, confirms the evidence of Ballentine in regard to the work done.

Mitchell is called; he says that he was sent by Patton to assist in the work, but that he found that the men did not need his services, and could get on without him. Evidence is given in rebuttal to shew that Ballentine, when speaking to the parties who were staking, did not indicate at that time the drifts in the direction where he now says they are. A great deal of evidence is given in this case which is wholly irrelevant and unnecessary, relating to work upon other claims, shewing that the witnesses who proved the representation work were unreliable because in other representation work they did not tell the truth in their affidavits proving up their work. As I have said in my former judgment in Hocking v. Wenzel, this evidence was wholly inadmissible upon legal principles, and was wholly unfair in that the parties could not answer, and could not be expected to answer on the trial, evidence which came in as a surprise. I must say that the examination of Brown and Ballentine shews that great doubt as to their truthfulness might arise, and that if the Gold Commissioner had not proceeded upon a wrong principle in taking the evidence as to the work done, I should have great hesitation in overruling him upon the facts. But that his mind was biassed by the evidence improperly admitted is beyond doubt. He says so himself, and, that being the case, one cannot give the same weight to the judgment upon the facts as otherwise would be given. I can only repeat what I have said in my former judgment as to the onus of proof and as to what should be required of a relocator in the way of proof upon his attempting to deprive an owner of property of which he is in possession, and on which he is at least attempting to perform the work required by the statute. If a relocator is, as I have said in

that former judgment, to get the benefit of the default of an owner in the performance of his representation work, then he should be called upon on his part to comply exactly with the requirements of the statute, and in this case he has not so complied. The stakes were not the proper size; they were not his own stakes; they were not blazed at the top; the writing was at the bottom; the name was not signed as required by the Act. I, therefore, do not need to go into any of the questions of law which were raised, only expressing again the views which I have given in the other judgment. For these reasons I think the appeal should be allowed with costs.

DUGAS, J.:—In these cases I am of the opinion that the appeals should be allowed with costs in both Courts, for the same reasons which I have given in Hocking v. Wenzel, and which it would be idle to repeat here.

YUKON TERRITORY.

DUGAS, J. OCTOBER 1ST, 1907.

TRIAL.

GWILLIM v. DAWSON ELECTRIC LIGHT AND POWER CO.

Solicitors — Retainer — Trading Company — Contract—Absence of Seal—Letter Written by Authority of President—Actual Owner of all Shares in Company—Statute of Frauds—Powers of President—Sanction of Directors and Shareholders—Ratification — Estoppel—Change of Interest in Company — Joint Contract — Separation of Joint Contractors—Termination of Retainer—Costs.

Action by F. L. Gwillim and F. G. Crisp, solicitors, to recover an amount alleged to be due for professional services.

F. T. Congdon, K.C., and J. P. Smith, for plaintiffs.

J. B. Pattulo and J. K. Macrae, for defendants.

DUGAS, J.:—The plaintiffs are solicitors practising in Dawson, and the defendant company are a trading company incorporated under the laws of the Yukon Territory, having their head office in Dawson.

The statement of claim discloses that in April, 1904, it was agreed by and between the plaintiffs on the one hand and the company defendants, one James A. Williams, and the Coal Creek Coal Company, on the other hand, that the plaintiffs should, during the year from 1st May, 1904, to 1st May, 1905, act as solicitors for the company defendants. J. A. Williams, and the Coal Creek Coal Company, in consideration of which the company defendants, the Coal Creek Coal Company, and J. A. Williams, agreed to pay an annual retainer or salary of $1,500 and disbursements; the $1,500 to be paid in monthly instalments of $125 each.

In April, 1905, the plaintiffs and the three other parties made another similar agreement as to the retainer to be paid to the plaintiffs, who were to render the same services to the three of them as solicitors.

The first agreement was in writing. The second agreement was partly in writing and partly oral, inasmuch as the conditions were made by letter of the plaintiffs to the same parties, accepted within the year and acted upon by all, with a slight difference which does not affect this case.

On 21st April, 1906, the plaintiffs, wishing to have their contract continued for the ensuing year, addressed themselves to the three parties in the following terms:—

"Dawson Electric Light and Power Co.,
"James A. Williams,
"The Coal Creek Coal Company,
"Dawson, Y. T.

"Dear Sirs:—Referring to our retainer which terminates on the 21st April, we beg to say that we are prepared to accept a retainer on the same terms for the year commencing May 1st, 1906, and if this is satisfactory please advise us of your decision so to do, which will operate as a retainer without the necessity of a formal agreement.

"Yours truly,
"Gwillim & Crisp."

To this proposition an answer was sent on 23rd April, in the following terms:—

"Gwillim & Crisp,

"Barristers,

"Dawson, Y. T.

"Gentlemen:—Your letter of April 21st regarding retaining fee for the year commencing May 1st, 1906. Mr. Williams left instructions for me to write you that he would pay the same retainer fees as contained in the former agreement, and if you would call his attention to this letter when he returns he would see to the same in person.

"Yours truly,

"Garvin,

"Accountant."

This letter is written on paper of the company defendants, the heading of which bears both the corporate name of the defendant company and the name of James A. Williams as president thereof. It was proven that at the time Garvin acted as accountant for the defendant company, and in his absence had a semi-management of the business; also that this letter was written upon the express instructions of Williams. This is the agreement relied upon by the plaintiffs for that year as per paragraph 5 of the statement of claim. This agreement was acted upon by all parties, the plaintiffs performing their work as solicitors for the three concerns, and the defendant company paying the monthly instalments of May, June, and July, which were entered in their books, cheques being given. One letter is produced mentioning that a cheque is sent for the monthly instalment of July.

On 31st July, 1906, the plaintiffs and the company defendants stated an account, and by the said stated account it was agreed that the defendant company were then indebted to the plaintiffs under the agreements above mentioned in the sum of $965.70. Plaintiffs' services were continued, and on 31st August they were entitled to an additional sum of $125, which, at that date, would bring the amount to which the plaintiffs would be entitled to $1,090.70, on account of which a credit of $224.75 should be given, which then brought the plaintiffs' account to $865.95. As far as this amount is concerned there is no contestation, the defendant company, though denying the liability, having brought the money into Court. I take it further, by all the evidence and the circumstances to which I will eventually refer, that this amount

is admitted to be legally due, and that the defendant company have been and are willing to pay the same.

This joint contract between the parties, which might be, under other circumstances, considered as extraordinary, is explained by the fact that Williams was the sole and exclusive proprietor of all the shares of the defendant company, and of the larger part, if not all, of the Coal Creek Coal Company, though 51 shares in the defendant company were divided in two lots of one and fifty shares which he kept alternately in the names of some relations of his, of some of his clerks, and even of the plaintiff Gwillim, so that the latter not only acted as solicitor and secretary of the defendant company, but also, at a time, as director and shareholder thereof.

It does not appear that the shareholders or the directors of the said defendant company were ever more than three, composed of such persons, and there is no doubt that Williams was and remained proprietor of the whole stock of the defendant company since 1904, and that, though carrying on the other business under the corporate name of the Coal Creek Coal Company, he was also largely interested therein as proprietor of the greater portion of the stock, if not of all

Since 1904 Williams was the president of both companies, and acted as the manager thereof, though at the same time he styled himself the lessee of the Coal Creek Coal Company.

On 7th September, 1906, all the shares of the defendant company were transferred to Dr. Andrew S. Grant and N. A. Fuller, who apparently became the sole proprietors of all the assets of the defendant company, though one share to satisfy the purpose of the law, which requires at least three hareholders, is in the same of one Arnold, the now vice-president of the company. The defendant company, or rather the new owners, if I can speak that way, contend, amongst other things, that since that date the contract was no more binding upon them; that they (the owners) did not know of its existence; and that in any event the plaintiffs, having acted adversely since 31st August to the interests of the company, had committed a breach which freed them from any responsibility thereunder if otherwise bound. As soon as they found that the plaintiffs insisted on being still recognized as the solicitors of the defendant company, at the end of September or beginning of October they objected,

and finally on 4th and 5th October, by letters from Messrs. N. A. Fuller and Macrae (the latter representing Dr. Grant), gave them notice that they repudiated them for the company as the company's solicitors.

The plaintiffs now claim not only the $865.95 due on 31st August under the agreements, but also the interest thereon and the monthly instalments for September, 1906, to April, 1907, inclusively, with interest thereon as the same became due.

The learned counsel for both plaintiffs and defendants seem to have exhausted all the legal points which could be raised in the case.

One of the contentions on the part of the defendant company is that the Attorneys and Solicitors Act of England of 1870, which is an amendment to the general law on the subject there, is in force here, and that all retainers between solicitors and clients should be fixed in writing.

By the 11th section of the North-West Territories Act it is declared that "all the laws of England relating to civil and criminal matters as the same existed on the 15th day of July in the year of our Lord 1870, shall be in force in the Territories, in so far as the same are applicable to the Territories, and in so far as the same have not been or are not hereafter repealed, altered, varied, modified, or affected by any Act of the Parliament of the United Kingdom applicable to the Territories, or of the Parliament of Canada, or by any Ordinance of the Lieutenant-Governor in council, or of the Legislative Assembly."

By the Yukon Act this 11th section was made a law of the Yukon Territory, and as the North-West Territories legislature, as well as the council of this Territory, have passed laws regulating the legal profession, and therefore concerning attorneys and solicitors, I would say, if it were necessary in the present case, that my views are that this amendment of 14th July, 1870, passed in England, to the law concerning attorneys and solicitors, is not in force here, and for this I would rely upon United States Savings and Loan Co. v. Rutledge, 2 W. L. R. 471, decided by this Court and carried to the Supreme Court, 37 S. C. R. 546, and upon the case of Bowcher v. Clark, 4 W. L. R. 292, which did not go any further than this Court.

The Statute of Frauds is also pleaded, it being alleged that the agreement should have been in writing to satisfy

the same statute. On this point, therefore, we have to see whether the letter of the plaintiffs dated 21st April, 1906, and the answer in writing by Garvin of 23rd April, 1906, are such as to form a written agreement which would put the same out of the Statute of Frauds. We have in the first place to consider what power Williams had, and whether, as such proprietor, shareholder, director, and president of the company, he could bind the defendant company to a contract of this kind, taking into consideration all the circumstances accompanying it.

The defence has submitted that such a contract should have been under seal and that it was beyond the functions of Williams. It has been pointed out that there is a difference between a general and special retainer, in which latter case it would be admitted that the president or the manager of a company would be justified in employing without a sealed contract a solicitor in a special case, whether suing or being sued; but not in a case like the present one where the services are retained in a general way for a specific term. I agree that in ordinary circumstances, without the sanction or ratification of the directors of an incorporated company, it would be difficult to hold that a company could be bound by such a contract, as I would not take it to be within the ordinary scope of powers vested either in a president or a manager of a company. This would more strongly apply to any company which is not a trading company, as the trend of the aut' orities on the point shews that municipal, charitable, and religious corporations, and the like, have to observe stricter rules in their administration than trading companies. . . .

[Reference to Lewis v. City of Rochester, 9 C. B. N. S. 401; Barrie Public School Board v. Town of Barrie, 19 P. R. 33; Sutton v. Spectacles Makers Co., Digest of English Case Law, vol. 13, p. 1413; Addison on Contracts, p. 352; Hunt v. Wimbledon Local Board, 4 C. P. D. 48; Cook v. Seaford, L. R. 10 Eq. 678, L. R. 6 Ch. 551; Nicholson v. Bradfield Union, L. R. 1 Q. B. 620; South of Ireland Colliery Co. v. Waddell, L. R. 3 C. P. 463; Henderson v. Australian Royal Mail Steam Navigation Co., 5 E. & B. 409; Reuter v. Electric Telegraph Co., 6 E. & B. 341; Lindley on Companies, pp. 222, 223; London Dock Co. v. Sinnott, 8 E. & B. 347; Bullen & Leake, pp. 677,688; Asbury R. W. Co. v. Riche,

47 L. J. P. C. 87; Phosphate of Lime Co. v. Green, L. R. 7 C. P. 43; Wilson v. West Hartlepool R. W. Co., 2 D. J. & S. 475; Irvine v. Union Bank of Australia, 2 App. Cas. 366; Grant v. United Kingdom R. W. Co., 40 Ch. D. 135; In re Portuguese Copper Mines, 45 Ch. D. 16; In re Empress Engineering Co., 16 Ch. D. 125; In re Rotherham & Co., 25 Ch. D. 103; Arnold v. Poole, 4 M. & G. 860; Clark v. Union Fire Insurance Co., 10 P. R. 339; Newington Local Board v. Eldridge, 12 Ch. D. 360; Eley v. Positive Government Surety Life Assurance Co., 1 Ex. D. 20; Ray v. Kemp. 26 Ch. D. 69.]

The trend of the above cases clearly shews, to my mind, that a great distinction exists between trading and non-trading companies as to the management of their affairs generally; that, whilst the non-trading companies are bound to use their seal in very ordinary contracts, unless excepted by law, the trading companies can dispense with their seal in contracts generally which are within the scope of their business. Under the above authorities I would not, however, be prepared to admit that such a contract as the present one would be within the ordinary powers of a president or manager of such a company, more particularly considering that the plaintiffs were hired not only as solicitors of the defendant company, but of the Coal Creek Coal Company and of Williams personally. If the case was to stop there without taking into consideration the other positions of Williams towards the company defendants, and all the other circumstances of the case, I would surely hesitate to consider this contract as binding.

I do not believe that the question raised as to the absence of the seal of the company on the contract can be seriously considered, as the defendant company were incorporated under ch. 57 of our Ordinances, which, by secs. 78 and 79, dispenses with seal; all of which tends to shew that the seal of the company is of no importance provided the contract is otherwise legally binding, and I believe that as far as trading companies are concerned the modern views are strongly to that effect and are sustained by the authorities above cited.

But there is something more than the personal action of Williams in this matter. He was not only the president, not only one of the shareholders, not only one of the directors, of the company defendants, but he was, so to speak, all of it;

for even the 51 shares which were under the name of one or other of his relations, or of one or the other of the employees of the company, evidently remained his own property, and were so transferred only to satisfy the exigencies of the law, which requires at least three shareholders to give to such a company as the defendants a legal existence. All the assets of the company were his personal property, and in fact it might truly be said that he was the bone and sinew of the company.

The Coal Creek Coal Company were also, to a great extent, his property. At all events he possessed the greatest number of shares; he styled himself the lessee thereof; and by all that can be gathered he had the entire control of it. In fact the company defendants, the Coal Creek Coal Company, and Williams himself, might justly be considered as being "Williams, Williams, and Williams."

It is under such a state of things that he agreed in writing, as president of both companies and for himself, to the contracts of 1904 and 1905. As to the contract for 1905, the proposition was made to him in writing, but was accepted by him only verbally, but within the year, so that the Statute of Frauds could not be invoked against the execution of the contract. No doubt that in verbally accepting the same he acted as president of both companies and for himself, he being then, as before and afterwards, the factotum of both companies.

As to the last contract. I take it that when Garvin wrote his letter of 23rd April, 1906, in answer to the letter of the plaintiffs of 21st April, 1906, he wrote under the instructions of Williams acting in the capacities above mentioned.

The plaintiffs did not allege a resolution passed by the directors or shareholders of the company as to the powers of Williams, but the defendant company have produced their minute book, and have referred to a resolution passed on 25th August, 1904, by which it appears, amongst other things, that Williams, as president and manager of the company, "is further hereby authorized and empowered to sell and dispose of any other property, real or personal, the company may own, and to execute and deliver transfers thereof, and to transact any and all other business of whatsoever kind or nature for and in behalf of the company and under its corporate name and seal."

The defendant company have tried to make it out that this resolution limited the powers of Williams to signing contracts under seal. I take it to be the very contrary, and that this was meant to extend his powers necessarily to all contracts and deeds which might be required to be under seal, so as to give him the entire administration of the affairs of the company, even without the ordinary interference of the directors or shareholders by resolution or otherwise. It seems to be so much so that, according to the same minutes, the first meeting of the directors which ever took place afterwards was on 31st August, 1906, and it must be inferred that in the meantime the affairs of the company were left entirely under the control of Williams as such president, shareholder, or stockholder. What he did was with the assent of the other two directors, whosoever they may have been in the meantime, who were also the other two shareholders. As to this I have no doubt. No more do I doubt that such a contract was within the powers of the company, and that the directors would have had the right to assent to it by an ordinary resolution.

In In re Cartmell, L. R. 9 Ch. 695, it is admitted in so many words that the knowledge of the directors would give effect to the action of a manager or director, as the case may be, which otherwise would not be binding. . . .

[Reference also to Lindley on Companies, pp. 177, 178, 180; Smith v. Hull Glass Co., 8 C. B. 668; McEdwards v. Ogilvie, 4 Man. L. R. 1; Royal British Bank v. Turquand, 6 E. & B. 327; Angell & Ames on Corporations, secs. 283, 284; Reuter v. Electric Telegraph Co., 6 E. & B. 341.]

The principle, therefore, seems to be that any act or anything done which would be within the scope of the powers of the directors or shareholders, if done with their authority or with their sanction, or acted upon or ratified by them, whether as a board or as directors or shareholders, will be binding, even if the party representing the company acted ultra vires.

By what has been said before it must be accepted that the assent and ratification of the other shareholders or directors of the company defendants was given to the contract, and that it was amply ratified.

The only question, therefore, is whether the letter of Garvin can be considered as authorized by Williams in his

aforesaid capacity, so as to make it a contract in writing and keep it out of the Statute of Frauds.

Evans v. Hoare, [1892] 1 Q. B. 593, was an action by a clerk to recover damages for wrongful dismissal. In 1886 the plaintiff entered into the service of the defendants as ledger clerk at a salary of £80. On two subsequent occasions his salary was raised £10, bringing it up to £100 a year. On 19th February, 1890, the following document was drawn up by a clerk of the defendants named Harding, who was acting with the defendants' authority, and presented by Harding to the plaintiff for signature, and signed by the plaintiff. It was held that the defendants' name inserted in the letter by their authorized agent amounted to a signature binding on defendants within sec. 4 of the Statute of Frauds, and that plaintiff was entitled to recover.

With the exception that in the present case the defendants are a company, it seems that it would be difficult to find a case more on all fours with the present one. The letter of the plaintiffs dated 21st April being addressed to the three parties, it must be taken that the answer of Garvin for Williams, written upon the paper of the defendant company, with the name of the defendant company printed thereon, and that of Williams as president thereof, was sent as an acceptance by the three concerns of the proposition made by the plaintiffs to renew the contract for the three. The three first months of the year were paid, and the entries made in the books of the company; in a statement prepared of the liabilities of the company, plaintiffs' account is mentioned under the contract; on 25th August, 1906, on the same paper, we find a letter addressed to the plaintiffs inclosing cheque for $125, being the amount of their legal fees for the month of July, and on 23rd May, 1906, on similar paper, instructions in the name of the defendant company, per Williams as president, to the plaintiffs, to notify a certain concern about some claims in damages.

. . .

[Reference to Oliver v. Hunting, 44 Ch. D. 205; Boydel v. Drummond, 11 East 142; McLean v. Dunn, 4 Bing. 727; Bernardin v. Municipality of North Dufferin, 19 S. C. R. 639; Gibson v. Barton, 10 Q. B. D. 336.]

Under these authorities I have to come to the conclusion that the contract alleged by the plaintiffs is binding upon the company defendants from 1st May, 1906.

Estoppel has been invoked by the defendant company on account of the action of the plaintiff Gwillim, after the transfer of the shares of the company to Dr. Grant and Mr. N. A. Fuller; it being said that he acted adversely to the interests of the company, and therefore had put an end to the contract.

Having regard to the fact that it is not pleaded, and the view which I take otherwise of the case, I do not think it necessary to consider this point.

The last point which is of some interest is the effect of the segregation of the three concerns upon the contract.

. . .

[Reference to Re Cameron and Lee, 18 P. R. 176; In re Allen, Davies v. Chatwood, 11 Ch. D. 244; Gibson v. Lupton, 9 Bing. 297.]

All these cases tend to shew that in the interpretation of a joint contract of this kind the intention of the parties, as a general rule, has to be taken into consideration, which intention must be inferred from circumstances; and it is further made evident that in such joint contracts by solicitors a more strict rule will apply, and that divisibility of the responsibility will be ordered by the Courts whenever the interests of the clients cease to exist or are severed from the others, and that equity requires it.

The relationship existing between solicitors and clients is looked upon with a certain jealousy against the solicitors, who are very much assimilated to guardians or trustees, against whom the stricter rules are always applied.

It cannot be imagined that at the time of the passing of the contract between the plaintiffs and the company defendants, under the circumstances mentioned, it ever was contemplated that it would continue to exist should a segregation take place between the parties, and that, for instance, one or the other company would hold itself responsible for any amount of disbursements incurred by Williams in any case or suit in which he might have been personally interested and with which the companies would have nothing to do.

I believe that under those authorities I am justified in taking an equitable view of the whole matter, and I maintain that this contract, as far as the joint responsibility existed, was ended when all the interests of Williams passed to Dr. Grant, Mr. Fuller, and Mr. Arnold, who are now the only shareholders and directors of the defendant company.

I further believe that the plaintiffs, through Mr. Gwillim, acted adversely to the interests of the defendant company at the very initiation of the deal between Williams and the purchasers, and more especially after the sale had been consummated on 7th September, 1906. It is evident to me that before the sale Mr. Gwillim more particularly looked to the interests of Williams in opposition to those of the defendant company, and that after the sale and during September his action in refusing to deliver certain papers unless a complete release was signed in favour of Williams was such a breach, as far as the defendant company were concerned, as to justify the company in putting an end to the entire retainer, as soon as it was found that the plaintiffs persisted in considering themselves as their solicitors thereunder, which they did by the letters of Messrs. Fuller and Macrae under date of 4th and 5th October.

It is true that in the meantime the plaintiffs had done some slight work for the defendant company, which they were in duty bound to do, as it related to pending cases, but which required but light attendance on their part, and for which they should consider themselves sufficiently paid by receiving one-third of their retainer from the defendant company. In coming to this conclusion, I feel, besides, that I am pretty much in accord with the ideas which the plaintiffs had themselves at the time and after the segregation, as Mr. Gwillim admits so much as to strongly impress one, to say the least, that his claim against the defendant company for the rest of the year is due to an afterthought, and is the result perhaps of an ill feeling due to the way in which his services were further dispensed with.

In coming to this conclusion, by which I declare that the plaintiffs are entitled to more than the defendant company admit by only $41.66, for which I believe that judgment should be entered, in addition to the $865.95 deposited in Court, making in all $907.61. I must say that I have been greatly perplexed by the question of costs. I cannot discard from my mind that very heavy costs might have been saved to the defendant company if that further sum had also been brought into Court, and I may say that I have for a long time hesitated as to what I should do in the matter; yet if I am right in allowing to the plaintiffs one-third of the September salary against the defendant com-

pany, and if the plaintiffs were, as I believe, entitled to it, I cannot see how I could say that the plaintiffs should not have gone to litigation for such a paltry sum, as I would be in that way declaring that they should have accepted less than what they were entitled to.

If, instead of denying their liability, the defendant company had admitted it at the same time that they deposited the $865.95, they might, perhaps, have put me into a better position to help them in the matter, but by their plea they have forced upon the plaintiffs an issue in that behalf, for the plaintiffs became bound not only to prove that the defendant company owed them more than they deposited, but also that they were liable, in order to be able to obtain judgment.

The latest case on the subject is Wagstaffe v. Bentley, [1902] 1 K. B. 124. In that case damages were sued for. The defendants brought into Court £80, alleging that this was more than sufficient to pay any damage which might be proven against them, and denied, at the same time, their liability. The verdict was for £35 only, and yet it was held that the plaintiffs were entitled to their costs on the issue of negligence, on which they had succeeded. I may say that this late judgment is in conflict with Goutard v. Carr, cited by the same Court, and other cases cited at p. 293 of the Annual Practice of 1903; though there seems to have been even then some difference of opinion amongst the Judges on the question.

The position of the plaintiffs here is stronger than that of Wagstaffe, inasmuch as the plaintiffs recover not less but a little over the amount brought into Court, and, if there was any justification for ordering the costs of the issue to be paid by the defendants in this last case, I feel that I cannot help ordering that the costs be paid by the defendant company in the present case, but, as it is within my power to reduce them as much as possible, considering the position of the parties towards each other and all that has been said above, those costs will be taxed according to the lowest scale.

As to the interest, I do not think it should be allowed as claimed, as it is not sufficiently certain when each payment should have been made, but it should be computed on the full amount of $907.61 from the date of the service of the action.

It is therefore ordered that judgment be entered in favour of the plaintiffs to the amount of $907.61, and that the sum of $865.95 be paid out of Court to the plaintiffs in part satisfaction of the judgment, including interest, and costs of this action, to be taxed on the lowest scale.

YUKON TERRITORY.

CRAIG, J. OCTOBER 4TH, 1907.

CHAMBERS.

ALLMAN v. YUKON CONSOLIDATED GOLD FIELDS CO.

(TWO ACTIONS.)

Security for Costs—Residence out of Jurisdiction—"Ordinarily Resident"—Roving Plaintiffs.

Motion by defendants for security for costs.

J. M. Carson, for defendants.

J. A. Clarke, for plaintiffs.

CRAIG, J.:—The plaintiffs in these actions were employed in Vancouver, B.C., under a contract to come into this Territory and work as carpenters, the contract providing for 5 months' employment and other conditions. After working a short time, it appears they were dismissed for incompetence, and they now bring actions under the contract for their wages.

The defendants move, under Rule 528, for security for costs. The Rule is: "When the plaintiff in an action resides out of the Territory, and in any other case where by the practice and procedure in England the defendant is entitled to security for costs, and the defendant by affidavit of himself or his agent alleges that he has a good defence on the merits to the action, the defendant shall be entitled to a summons to shew cause why an order should not be issued requiring the plaintiff to give security for the defendant's costs." And under this Rule, which provides for the practice in England applying, the defendants invoke Order 65,

Rule 6 (a), which is as follows: "A plaintiff ordinarily resident out of the jurisdiction may be ordered to give security for costs, though he may be temporarily resident within the jurisdiction."

The facts relating to the residence of the plaintiffs in this case are set out by them in their affidavits in answer to the motion, and on their cross-examination on the affidavits. The defendants in their affidavit on the motion swear that the plaintiffs ordinarily reside at the city of Vancouver, in the province of British Columbia, and base this affidavit upon the fact that the contract of hiring was made there, and that the plaintiffs requested transportation back to Vancouver on their discharge as provided in the contract.

Upon the cross-examination of the plaintiffs, Arthur Allman says that he was born in England; his parents are British subjects, living in London; that he has been away from home for 10 years, and resident during that time in different parts of Canada for 8 years; that he has spent a longer time in the Yukon Territory than in any other place he has been in since leaving England; that he came into the Yukon Territory two years ago, and went out again, and now came back under this contract; that before signing the contract it was his intention to come into the Yukon Territory to look for employment; that when he first came to America he lived in Manitoba for about 3 months; then he came to British Columbia; afterwards went to Washington and Idaho; came into the Yukon Territory in May, 1905; worked in the White Pass ship-yard for 4 or 5 months; then went on to Conrad and Windy Arm in the Yukon Territory, remaining there 6 or 7 weeks; and then went to Huna Hot Springs in Alaska, U. S. A.; remained there 6 weeks; came back to Conrad, in the Yukon; again went to White Horse, and remained there for 10 weeks; came into Dawson June, 1906, remained 2 or 3 weeks; went down to Fairbanks, Alaska, U. S. A., remained there a few weeks; and went on to Fort Gibbons, in Alaska, remained there till September, 1906; came back to Dawson, remained a month; went out to British Columbia; from Vancouver he shipped in the Empress boats to China, made two round trips, coming back in the spring of this year, 1907; and then came into the Yukon Territory under this contract. He has no permanent post-office address, and says he will stay where he gets work. Finally, the question being asked him "Q. So that

your residence pretty much depends on where you can get good work and do the best?" he says—"Just so; that is my reason for residing in the Yukon." And he says he has no property at present in the Yukon Territory.

In the application against William Allman, the defendants' affidavit is the same as in the former case, and in reply the plaintiff says his parents are British subjects; he left home 20 months ago; continuously resident in Canada; that during the 20 months' residence in Canada he has spent the whole of the 20 months, except the time spent in travelling to and fro, in the city of Vancouver; that he only spent 4 months in the city of Vancouver to avoid the rigorous winter of the Yukon; that he has no present intention of changing his residence so long as he can get employment here; that he asked for his transportation back to Vancouver simply for the purpose of selling it, and not for using it to go out; that he is now working and prospecting a mining claim with the object of taking a lay to work this placer claim. On his cross-examination it appears that upon arriving in America from England he came straight through to the Yukon Territory, and he has not had the extensive travelling experience of his brother Arthur.

Prior to the passing of Order 65, Rule 6 (a), Rule 981 (a), the law of England was as decided in the case of Redondo v. Chaytor, 4 Q. B. D. 453. There it was held that "a foreigner usually residing abroad, who is temporarily residing in England for the purpose of enforcing a claim by action, cannot be called upon to give security for costs." Thesiger, L.J., who gave the leading judgment in that case, said that upon the facts he was of opinion that "the plaintiff was really in the country merely for the purposes of the suit, and probably would go abroad again as soon as judgment was given." He declared the settled rule of practice in England was that "in such cases if the party was in England at the time of making the motion for security, although only temporarily, security for costs could not be enforced." He further said: "So stands the question of authority. In the face of these authorities we have no course open to us but to dismiss the appeal. We are not called upon to say what, if the matter were res integra, ought to be the rule, but whether the Court below were right or wrong as to the settled rule of practice. But, as there is a strong feeling on the part of one member of the Court that the

said rule is unreasonable, I should like to add a few words on that subject. No doubt, in one view of the matter, where the plaintiff is a foreigner, and will probably leave the country if unsuccessful so as to avoid paying the costs, it seems rather hard that he should not be called upon to give security, more especially as it is clear that there is no hard and fast rule in the converse case, and where a person usually resident in the jurisdiction is temporarily out of it, the Courts will not compel him to give security." He further goes on to reason the matter out as follows: "And, although there are, no doubt, strong reasons on which a change of the law could be urged, I do not wish to be understood as giving an opinion in favour of the change." Baggallay, L.J., agrees, and Bramwell, L.J., also agrees with the exposition of the law by Thesiger, L.J. He says as follows: "I think the rule ought to be different, for the present rule seems to me to work injustice." Clearly the amendment—6 (a), passed in 1895—was passed to conform with the views of the Court in this case and similar authorities. The Rule in Ontario is precisely the same. The only English case that I can find since the passing of that Rule which gives me very much aid, is Michiels v. Empire Palace Limited, 66 L. T. 132, the report of which we have not got in our library. In a note given in the Digest of English Case Law, the case is reported as follows: "The words of Rule 6 (a) of Order 65 of the Rules of Court—'temporarily resident within the jurisdiction'—have an elastic meaning, the object of the Rule being to cover a case in which a foreigner ordinarily resident out of the jurisdiction would not be here when he was wanted." The case of Howard v. Howard, 30 L. R. Ir. 340, is noted there, the facts in that case being that the plaintiff had formerly and at the time of the commencement of the action been a resident in France, and an order for security for costs was made on the application of the defendant, but before the order was acted upon the plaintiff came within the jurisdiction and moved to discharge the order. It was proved that he had continuously resided in Paris since 1880, earned his livelihood there, living with his wife, a French woman who carried on the trade of milliner, that he had resigned his situation there—an accountant—giving up his apartments, and moved to Ireland, instructing his wife to wind up the business, although she had not yet done that. He had leased a cottage in Ireland for a term

of five years, with power to surrender in 15 months, but so far had obtained no employment in Ireland. He swore that he intended to reside in Ireland for the future. It was held that the facts in that case did not establish to the satisfaction of the Court that the plaintiff's residence in Ireland was more than temporary, within the meaning of the Rule, and the order for security was allowed to stand.

Upon the argument in this case I raised the question as to the meaning of the words "ordinarily resident out of the jurisdiction," and whether, if it appeared that the plaintiff had no ordinary residence anywhere, he could be said to be ordinarily resident out of the Yukon, any more than he was ordinarily resident in the Yukon. This matter has been discussed in a series of cases in Ontario, where the Rule is the same. The first case that I will refer to is Denier v. Marks, 18 P. R. 465. There it was held by a Divisional Court that the words mean and refer to "a person who, under ordinary conditions or circumstances, is habitually present in some country or place out of Ontario; and that a person who has no home, and whose calling causes him to be as much in Ontario as elsewhere, cannot be said to come within this branch of the Rule." It was further in that case held by Meredith, C.J., that "the large discretion which is vested in the Court in the making or withholding of an order for security for costs should in this case be exercised against making an order the result of which would in all probability be to effectually shut the doors of the Court against the plaintiffs." . . .

[Further reference to and extracts from the judgments in that case.]

The next case in Ontario is Allcroft v. Morrison, 19 P. R. 59, where Denier v. Marks was fully considered and overruled. That was an appeal from the judgment of Ferguson, J., who considered himself bound by Denier v. Marks, although he says he might not have considered himself bound by the reasoning if he had not considered himself bound by the authority. In considering the matter as raised by Meredith, C.J., in Denier v. Marks, Osler, J.A., said: "The rule was considered in Michiels v. Empire Palace Limited. The Divisional Court thought that security might be ordered under it, even though it should not appear that the plaintiff was in England solely for the purpose of prosecuting the action, and in the Court of Appeal it was said by Lindley,

L.J., that the Rule was purposely made vague and elastic, for anything short of a man actually living in this country might be a temporary residence. I apprehend that the real object of the Rule was to cover a case in which a foreigner ordinarily resident out of the jurisdiction would not be here when he was wanted. . . . The actual residence abroad is still what, prima facie, entitles the defendant to security, and the plaintiff cannot answer the application by shewing that he has practically no fixed residence at all. When that is the predicament, the only residence he can be said to have must surely be that which he would be obliged to give in the indorsement upon the writ, viz., the country or place where he happened to be when his action was commenced. If that were within the jurisdiction, he would have complied with the practice." These last words are important. Moss, J.A., considered Denier v. Marks and Redondo v. Chaytor and Michiels v. Empire Palace Limited, and said he was unable to agree with the view of Meredith, C.J., as expressed in Denier v. Marks. . . .

[Quotation from judgment of Moss, J.A.]

The next Ontario case that I will refer to is Nesbit v. Galna, 3 O. L. R. 429, 1 O. W. R. 218, where it was held that the plaintiff actually resided out of Ontario when the præcipe order was made, but, security not having been given, he might be relieved from that order if he was now actually and intended to remain a resident of Ontario. Upon the evidence, however, such was not the case, the plaintiff's residence being Michigan and likely so to remain. Meredith, J., gives the judgment in that case, and he decides that the Master was right upon the facts, that the plaintiff's ordinary residence was out of Ontario.

The strongest case cited to me is Kavanaugh v. Cassidy, 5 O. L. R. 614, 2 O. W. R. 27, 143, 303, 391. The plaintiff, a man about 36 years of age, who had since childhood lived in the United States, came to Toronto in October, 1902, as inspector for his employers—brokers in New York—of a branch office in Toronto. He was then instructed by his employers to act as telegraph operator in the Toronto office. These brokers gave up business in a few weeks, and he was then employed as a telegrauh operator by their successors. The business of the successors also came to an end within a few weeks, and in connection with the business the plaintiff was accused by the defendant of fraud, and arrested, an ac-

tion for damages being brought in consequence thereof. He was an unmarried man and had been in the habit of living with his mother in Kansas when out of employment, and he stated on cross-examination that he would return to the United States if he could find employment there. Held, that under these circumstances the defendant was entitled to security for costs of the action. It will be seen that this case of Kavanaugh v. Cassidy, which is the strongest case for the defence, is distinguished from the case which I am considering because the plaintiff swore that he had a fixed place of residence at Kansas and lived with his mother there when out of employment.

The case most nearly similar to the one I am considering is Denier v. Marks, but I think the facts in this case here are stronger in favour of the plaintiffs than in that case. It cannot be said that either of these plaintiffs came into this country to institute the action. The cause of action arose here, arose upon the contract made with the defendants, by which contract the defendants required them to become residents within this Territory to carry on their work; the contract provided that they were to go to the Yukon and there take up their employment; the breach occurred here; when they sued out their writ they were here; they had no other residence in any other part of the world than this; they are still here, and both swear that they intend to remain here if they can get employment. I am very strongly of opinion that Rule 6 was passed to meet the view of the Court in the cases such as Redondo v. Chaytor, and the Ontario Rule was passed after the English Rule. Killam, J., in Cordingly v. Johnson, 11 Man. L. R. 4, comes to the conclusion that the amended Rule was passed to meet just such cases as Redondo v. Chaytor, and in concluding his judgment in that case said: "I am not convinced that the plaintiff's return to Manitoba is anything but a device to evade obligation to give security." There can be no question that the plaintiffs in this case are not resorting to any device to evade the Rule. As I have already said, they are here by virtue of the contract with the defendants. If they are compelled to give security for costs they swear—and it is apparent—that they cannot provide the security. They are debarred then of any access to the Courts to assert their rights, if they have them, and by the very people who bring them into this country under this contract. I cannot say that they have

any present intention of leaving this Territory; all I can say is that probably, if they receive a better offer, they will go and will not be here when wanted. But I am much inclined to agree with the reasoning of Meredith, C.J., in Denier v. Marks, and beyond that I cannot conceive of any residence that the plaintiffs have but the Yukon Territory. They are not ordinarily resident anywhere else, and they are only resident here. In construing a Rule of this nature, the Court should be liberal to the plaintiffs, and should not debar any one from access to the Courts by a strict interpretation of the Rule. I think the words of Moss, J.A., are applicable to this case (19 P. R. at p. 65): "I understand the aim of the Rule to be, to put it out of the power of a plaintiff who is prima facie subject to the provisions of subsec. (a) of Rule 1198 to relieve him from giving security by shewing temporary residence in Ontario, for example, as in Redondo v. Chaytor." I do not think it is sufficient for the defendants to shew that these men have been rovers, working where they could get a good job, to bring them within the Rule, if they have now settled down in the Yukon Territory for a resonable residence. The strict application of this Rule in the early days of the Yukon would have prevented any one from bringing an action except the permanent government officials. No one professed to make the Yukon his permanent home, particularly the miners who were resident here only long enough to work out their placer claims, depending entirely upon the efficiency of their machinery and the richness of the claims. The same conditions prevail to-day, although we are now, it may be said, 10 years old as a community, and I would hesitate long to make such a ruling as would prevent the labourer who is a single man, such as these plaintiffs are, from bringing an action, and render him liable to give security for costs on the application of men who bring them into the Territory and establish them here as their workmen. Whatever may be said of the case of Arthur Allman, I am quite satisfied upon the facts that William Allman is a resident within the Yukon Territory and that he has no ordinary residence anywhere else.

The motion will be dismissed; costs in the cause.

YUKON TERRITORY.

OCTOBER 7TH, 1907

FULL COURT.

BRINDAMOUR v. ROBERT.

ROBERT v. BRINDAMOUR.

Contract—Miners' Lay Agreement—Master and Servant—Breach of Contract — Dismissal of Servant — Wages—Damages—Theft of Mineral — Action to Recover Property—Trial — Findings of Jury — Perverse Verdict—Appeal—Costs.

Appeal by the defendants Robert F. Robert and Thomas Foucrault in the first action, and by the plaintiff Robert F. Robert in the second action, and a cross-appeal by the plaintiff Michael Brindamour in the first action, from the judgment of DUGAS, J., or from a verdict upon the findings of a jury upon certain facts submitted to them.

The two cases were tried together before DUGAS, J., and a jury, and upon the findings of the jury to the questions submitted to them the action of Robert v. Brindamour was dismissed with costs, the action of Brindamour v. Hilare Robert, Thomas Foucrault, Sam Dupuis, and Aimé Burassa, was dismissed with costs; the counterclaim of Thomas Foucrault was also dismissed with costs; and a judgment given for the plaintiff Brindamour against the defendant Robert F. Robert with costs. From this judgment the defendant Robert appealed; the defendant Foucrault appealed from the dismissal of his counterclaim with costs; and the plaintiff Brindamour cross-appealed from the judgment in so far as it dismissed his action against the defendants Hilare Robert, Thomas Foucrault, Sam Dupuis, and Aimé Burassa, with costs.

At the conclusion of the evidence the trial Judge submitted the following 6 questions to the jury:—

1st. Had the defendant Robert F. Robert any bona fide reason to be dissatisfied with the plaintiff Brindamour, and therefore to put an end to the lay agreement with him, and

fall back upon wages for the time that he and the plaintiff, Hilare Robert, Sam Dupuis, and Thomas Foucrault, had worked under the written contract of 18th September, 1905?

2nd. Did he put an end to the said lay agreement on or about 1st May, 1906? If so, what is the amount due to the plaintiff Brindamour for wages and for his share in the material, machineries, etc., bought for the working of the claim?

3rd. Did the plaintiff Brindamour abstract or convert any gold dust at any time for which he did not account? If so, to what value each time?

4th. If so, what is the amount to which Foucrault is entitled upon the gold dust so abstracted or converted?

5th. Was there any settlement between the plaintiff Brindamour and the defendant Robert F. Robert as to the work done by him and Foucrault under the lay or percentage agreement during the summer of 1905 to the close of the summer season about 5th October?

6th. Was the plaintiff Brindamour paid the full amount due him by the defendant Robert F. Robert under this last percentage agreement; that is, for the summer of 1905, ending on 5th October, 1905?

To the first question, the answer of the jury was "no;" to question 2, paragraph 1, answer "yes, after wash up;" question 2, paragraph 2, answer "one-quarter interest of 75 per cent. of the gold dust extracted from the lay after paying expenses; also for all his interest in machinery, etc., the sum of $493.43;" question 3, answer "no, not proven;" question 4, answer "none;" question 5, answer "yes;" question 6, answer "yes."

There was no appeal or cross-appeal from the verdict of the jury as to questions 5 and 6, and it was admitted by all parties that the dealings between Robert and Brindamour to the close of the summer season of 1905 were settled in full between the parties.

The appeals were heard by DUGAS, CRAIG, and MACAULAY, JJ.

F. T. Congdon, K.C., and F. J. McDougal, for appellants.

Henry C. Bleecker and George Black, for respondent.

MACAULAY, J.:—The agreement entered into between the parties was written in French, and a translation of the agreement into English for the use and convenience of the Judges has been agreed on between counsel, and is in the words following:—

"Granville, Y.T., Sep. 18, 1905.

"R. F. Robert of Dawson, Y. T., recognizes and gives on lay my claim, being the lower half of No. 249 below lower discovery Dominion Creek, to Hilare Robert, Michel Brindamour, Thomas Foucrault, and Sam Dupuis, at the rate of 75 per cent. of all gold that will be extracted from said claim No. 249, and in addition appoint Hilare Robert to direct in everything and everywhere the said claim 249, and Hilare Robert, Michel Brindamour, Thomas Foucrault, Sam Dupuis undertake to work all the said claim as long as there will be pay to the satisfaction of all the parties of the first and second part. None of the parties can sell his right in the lay to any stranger. If a party is not satisfied with the working regulations of the first part or the second part, his interest in the machinery and all other improvements on the claim will be paid to him by me or the parties who remain with the lay, and his wages will be at the current rate on the creek, that is to say, Dominion Creek.

"Hilare Robert.
"Michel Brindamour.
"Thomas Foucrault.
"Sam Dupuis."

The agreement was drawn by Robert F. Robert at Granville, and signed in his presence by the 4 laymen.

The evidence shews that the plaintiff Brindamour, after the laymen had started to work, came to Dawson about 2nd December, 1905, having been injured in the hand by a broken glass in a bar-room at Granville. He remained in Dawson some time, and about the end of January proceeded back to Granville, but did not again work upon the claim until the latter part of March. He, however, did cook for the men for two days, and prepared an odd meal, and while he was away he did have a man working in his place.

On 6th December, after coming to Dawson, Brindamour handed a sack of gold to a man by the name of LaFrancois to take to the Bank of Commerce for him and dispose of there,

although he himself was only about some 400 feet from the bank. His excuse to LaFrancois for not going to the bank was that he was too drunk. Although the proceeds received from the gold amounted to something over $1,300, Brindamour told LaFrancois to give him $1,100 and keep the balance for his trouble. He asserted that he was disposing of this gold for a man by the name of Boulac, and although Boulac had told him there was about $1,300 worth of gold dust, he accepted $1,100 in full payment therefor.

Evidence was also given to shew that during the summer of 1905, at one of the clean-ups when Brindamour was working with Foucrault on a lay for Robert, he extracted a cup of coarse gold and said to his companion, "That is to pay for the outfit of Foucrault this fall." The evidence also shews that Brindamour took certain nuggets from the claim, and that while in Dawson in December, 1905, he and Robert had some words about the nuggets, and Robert says he told him then that he was dismissed, and he could not longer work under his lay. Brindamour denies this. Again, on 29th March, hearing that Brindamour was back on the claim, Robert says he telephoned to him and told him he could no longer work on the claim. Robert also telephoned some of the other laymen as to what he had done, and, although Brindamour denies that he was dismissed at that time, the evidence shews that there was a conversation through the telephone, and he afterwards stated to one of his co-laymen that he had been dismissed by the old man, meaning Robert. However, he did continue to work, Hilare Robert, a nephew of the defendant Robert F. Robert and the man in charge of the claim, permitting him to continue work because, he says, he thought that only his uncle had the right to put him off.

On 1st May, however, Robert F. Robert did go to Granville and formally dismiss all the laymen under the terms of his agreement, and put them on wages. This was at the commencement of the wash-up and before any clean-ups had been made. The spring wash-up was concluded about the end of June of that year.

Brindamour, when he arrived in Dawson on 2nd December, asserted that he had some $900 with him, $500 of which he gave to Robert to keep for him, and shortly afterwards he deposited in the Bank of Commerce something like $1,700 or $1,800. He alleged that the proceeds of the gold dust

had been paid to Boulac, and it did not form part of his account. He further asserted, however, that he had sold to one Boulac a fractional claim for $500, and received the cash therefor, although the records of the Gold Commissioner's office shew that no transfer had been recorded there, and the fractional claim stood in the name of Brindamour until it was allowed to lapse and revert to the Crown. During December he received some $2,000 and odd from Robert in settlement of his workings for the summer of 1905. He deposited $2,300 together with an additional sum of $1,000 which he drew from the Bank of Commerce, in the name of Dominique Morven, in the Bank of British North America at Dawson, and left with the bank a copy of his signature in the name of Dominique Morven. He drew cheques on this account from time to time until it was practically exhausted. The bank clerk from the Bank of British North America, a Mr. Maginnis, gave evidence on the trial, stating that at that time there was a sum of $150 to the credit of Dominique Morven in that account. On his examination for discovery in this action the plaintiff Brindamour denied that he had any other account except the account he had in the Bank of Commerce, either in his own name or the name of any other person, and said that the little money he had he kept in his pocket. When the case appeared in Court, and he was confronted by the presence of the bank clerk, he stated that his examination for discovery was taken in English, and he did not know what he was saying. From the answers made on his examination for discovery one must come to the conclusion that he knew exactly what he was saying when he stated he had no bank account, either in his own name or in the name of any other person, except the one in the Bank of Commerce.

There is evidence to shew that in a bar-room at Granville he had made the statement that he had robbed Robert and was sorry he could not take more from him, or words to that effect. He denies the placing of the gold dust in a cup, or says that, if he did put it there, it was fine gold and black sand. He is contradicted on all material points by almost every witness, and, after reading the whole of the evidence, I have unhesitatingly come to the conclusion that his evidence is wholly unworthy of belief. He did admit taking some nuggets and giving also some nuggets to another person to have a watch chain made of; all of which convinces

me that he is wholly unworthy of belief and will only tell the truth when he thinks it is more profitable to do so.

The evidence further shews that from the time he came back to Granville from Dawson, about the end of January, 1906, until the latter part of March, when he went to work on the claim, he spent most of his time in drinking and loafing around the hotels. He himself says he did the cooking for the men during that period, but there again he is absolutely contradicted by all the other laymen, who say he only cooked for two days and an occasional meal.

It is further shewn in the evidence that Brindamour had no other sources of income but the money he received from the working of the claim aforesaid.

The jury, in answering the first question in the negative, that the defendant Robert F. Robert had no bona fide reason to be dissatisfied with the plaintiff. Brindamour, in my opinion rendered a perverse verdict, and it was not such a finding as reasonable men might make, and is wholly unwarranted on the evidence submitted to them.

Their answer to the first part of the second question, "Did he put an end to the said lay agreement on or about the 1st day of May, 1905?" in which they say, "yes, after wash-up," is also absolutely unwarranted. It is admitted, even by Brindamour, that he was dismissed on 1st May, 1906, and the wash-up was not completed until the end of June. This also is absolutely perverse.

Many authorities were submitted to us to shew that the findings of a jury should not easily be reversed, but the one principle of law prevails, which is, that if reasonable men might find the verdict which has been found, no Court has jurisdiction to disturb a decision of fact which the law has confided to jurors, not to Judges.

I am satisfied no reasonable men could have answered question 1 and the first part of question 2 in the manner in which this jury did answer them without being perverse, and that the Court is justified in setting aside their verdict upon those answers.

It was argued before us, and authority cited, to shew that even at the time of dismissal, if the defendant had not knowledge of sufficient grounds for dismissal, but that afterwards he became possessed of such knowledge, it related back to the time of dismissal, and would be sufficient grounds for

such dismissal. I think the principle of law as stated cannot be disputed.

During the trial of this action the plaintiff Brindamour was allowed to amend his statement of claim to claim wages in the alternative, and it is admitted that, if it were found that he was entitled to wages up to and including 1st May, the exact amount coming to him for wages and for his interest in the machinery would be $1,328.93. I am of the opinion that he was dismissed at that date, and, although it was argued that at that time Robert knew that the claim was likely to produce large quantities of gold, and the fact is, did produce something like $23,000 or $24,000, and that the plaintiff's share as a layman would have been considerably more than he would receive as a wage-earner, the fact still remains that he was notified of Robert's dissatisfaction in December and again in March, and that when Robert came to the claim on 1st May he was actually dismissed and driven from the claim, and I think Robert had good grounds for such dismissal.

While I have very grave suspicions that the gold dust which Brindamour handed to LaFrancois to sell to the bank was gold dust he took from the claim, and while his evidence was so unsatisfactory and he gave no satisfactory account of how he came by the money, still I do not feel like disturbing the findings of the jury on that point.

The defendant Robert F. Robert admitted in his defence to the first action that there were wages due to Brindamour.

Therefore, the verdict of the jury, in my opinion, should be set aside, and there should be judgment for the plaintiff Brindamour for $1,328.93, with costs to the date of the filing of the defence of the defendant Robert F. Robert; all costs incurred after that date should be costs to the defendant Robert F. Robert; the appeal of the plaintiff Robert F. Robert in his action against Brindamour for the recovery of the gold dust should be dismissed without costs; the cross-appeal of Brindamour should also be dismissed without costs; and the defendant Robert F. Robert should be entitled to his costs of appeal in the action of Brindamour v. Robert.

CRAIG, J.:—I have read the judgment of my brother Macaulay in this case, and have also had the benefit of the expression of the views of the trial Judge, and, although I

do not agree fully with all the findings of fact made by my brother Macaulay, yet I think that, considering the views of both Judges, a more effective judgment can be given by my concurring with him, as his judgment is more nearly in accord with my own views, and there is not enough divergence to warrant me in giving an independent judgment, which could not be worked out to an effective order in conjunction with his.

If my own views were to prevail, I would allow the appeal of Robert in both cases. It taxes my credulity too much to believe any of the story told by Brindamour. We have a man who is proven to have had no private means except as the result of the operations which he carried on upon the claim of Robert. Admittedly he took nuggets which he had no right to take, shewing that he had even to that small extent very little regard for the property of other people. Next, we find him in Dawson, within a stone's throw of the Bank of Commerce, in possession, as he says, of $1,300 of gold dust, the property of another man, which he hands over to a person standing near-by to walk across to the bank with and sell. He receives back $1,100, allowing the person who spent 5 minutes' time in delivering the gold dust to the bank and bringing back currency, $200 for that transaction, and that out of the money not his own. His explanation is that this money is the money of a man named Boulac. We also have the evidence that he took a cup of coarse gold out of the cleaning pan of another man, amounting to a large sum; that in his cups near the camp he boasted of having taken money from Robert; that he had a secret account in the Bank of British North America in the name of another person; that he gave the bank to understand that he was that other person; that he chequed out this money from the bank, signing the cheques himself under a fictitious name; that he never had a power of attorney and never communicated to the third person, who, he says, was his brother-in-law, that such money was there. He simply used a fictitious name and represented himself as being that fictitious person for the purposes of concealment; and why, one would naturally ask, unless it was to conceal some improper act of his own? On examination for discovery he denies that he has any account in any bank either in his own name or the name of any other person, and says that all the money he has is the money he carries in his pocket. When faced on the trial with the bank clerk and the evidence of his own

acts at the bank, he says he did not understand the questions put to him on the examination for discovery, but no one can read that examination, in view of the fact that he made no objection at the time, without being convinced that he knew exactly what he was saying, and that he deliberately perjured himself in the statements he made. Then we have him accounting for another $500 by saying he sold a claim to Boulac; but when the records are produced we find no such sale ever took place. Again, in speaking of a certain cabin and the sale of it, he says to the person he addresses, "You would give a great deal more for that cabin if you knew what was inside of it," evidently implying that there was in the cabin something of value, and the only thing of value that could be there not visible to the world was gold dust, which miners often keep in odd corners around their cabins. During the continuance of the work in the time covered by the action, he was loafing and drinking around hotels, and was in constant trouble with Robert by reason of his conduct. These things taken in conjunction,—his deliberate perjury, his concealment of his money, the furtive way of his disposing of gold dust, the large sacrifice which he made in the sale of the $1,300 to the bank, the taking of the nuggets, the taking of the cupful of gold dust, the statement that he had robbed Robert, and the other facts, quite justify any jury in concluding that he stole from Robert the money which Robert says he took, and while it is possible, with great charity, to say that 6 reasonable men might have come to the conclusion that he did not steal, yet I would not come to that conclusion, and I do not think that reasonable men could have come to that conclusion, without stretching the doctrine of reasonable doubt to the utmost limits and beyond any limits to which it should be stretched by men who use their intelligence.

I quite agree with the suggestion of the learned trial Judge that a case of this kind is one which would warrant a trial Judge in directing the Crown counsel to prefer an indictment for perjury against Brindamour. As I have said before in this judgment, I think the ends of justice will be met by my concurring with the judgment given by Mr. Justice Macaulay, which I do.

DUGAS, J.:— . . . Mr. Justice Macaulay has prepared a written judgment covering all the points of the case.

This, with the view taken by my learned brother Mr. Justice Craig, dispenses me from the necessity of commenting on the case. I will only say that I fully concur in all that is said against Brindamour, as far as his conduct is concerned.

Having presided at the trial, I think that my charge to the jury shews that those were my views at the time, though I left the appreciation of the evidence to their judgment. There is an expression of mine in answer to some remarks of Mr. Bleecker, after the charge, which would induce the belief that I was entirely satisfied with the verdict of the jury. I must admit that the expression is strong, but at the same time I feel that I am in duty bound to explain that my mind was then bent on that part of the verdict which referred to the discharge of Brindamour by Robert on 1st May. A strong argument has taken place upon that point, and I felt that, in fact, a verdict could not have been brought justifying Robert in discharging Brindamour on that date. But, reviewing the evidence as written, I cannot say that my learned brothers are wrong in declaring that this discharge took place long before, and, notwithstanding the stand which I took at the trial, I will not enter a dissent.

YUKON TERRITORY.

CRAIG, J. OCTOBER 24TH, 1907.

CHAMBERS.

LUSHBAUGH v. CALLAGHAN.

Miners' Lien Ordinance — Preservation of Lien — Time — Service on Owners of Mining Claim—Originating Summons—Owners not Named as Parties—Substituted Service—Amendment.

Motion by plaintiff for leave to effect substituted service of an originating summons upon Con. Short and H. T. Wills, alleged to be owners of a mining claim.

The plaintiff claimed a lien under the Miners' Lien Ordinance for work done on creek placer mining claim No. 26 on Gold Run creek, between 9th October, 1906, and 27th

May, 1907. His claim of lien was dated 5th June, 1907, and was filed on 6th June. On 3rd August he took out an originating summons, intituled in the matter of a claim of lien, and in the matter of the Miners' Lien Ordinance, and between Lushbaugh, plaintiff, and Callaghan, defendant, and upon the same day obtained a certificate of proceedings under the Lien Ordinance, and registered the same as required by the Act. On the same day the originating summons was posted in the office of the Gold Commissioner at Dawson. On 5th August John Korbo, an alleged owner, was served with the originating summons; on the same day Callaghan, the defendant, was served. The originating summons was posted on the claim in question on 9th August. The claim of lien set out the number of the claim on which the lien was alleged to exist, and claimed against the land, machinery, chattels, and mining claim, being the property of Con. Short and H. T. Wills, the owners thereof, alleging that the work was performed for and upon the credit of George E. Callaghan, a layman. Korbo was not named in the lien claim, but only Short and Wills, and they were not named, nor was Korbo, in the originating summons, the only person specifically named as defendant being the layman Callaghan.

George Black, for plaintiff.

F. J. Stacpoole, for defendant.

CRAIG, J.:—The matter which I am now considering arises somewhat irregularly upon a motion to serve Wills and Short as parties defendants substitutionally, or their successors in title, and it was agreed by counsel that I should consider the question raised, which is this: are Wills and Short properly before the Court as parties defendants in the action under sec. 12 of the Ordinance, which provides that "every lien in respect of which a claim has been duly deposited under the provisions of this Ordinance shall absolutely cease to exist upon the expiration of 60 days from the registration of such lien, unless in the meantime proceedings are instituted to realize the claim under the provisions of this Ordinance." It is alleged on behalf of Korbo, Short, and Wills that they are not made parties defendants in the originating summons, and therefore that no action exists against them, and, the 60 days having expired, the lien ceases to exist as against their interest in this property. Wills was served, through his agent, on 13th July, with a copy of the

statement of lien filed. The originating summons was posted on the claim before the expiry of the 60 days, but without any order being given by a Judge, as required by the Placer Lien Ordinance, sec. 14, which provides that "upon a summons being granted the Court or a Judge may, after notice given to the various parties interested, including the workmen on the mining claim, which notice shall be given in such manner as the Court or Judge directs, summarily determine and fix the liability of the owner or layman."

As I have observed, no order was made under this section providing for the mode of service.

Upon the application of the plaintiff, and upon the affidavit of the plaintiff's solicitor that he had made search in the office of the Gold Commissioner and found that the claim on 21st August, 1907, stood in the name of Francis George Jemmett and Arthur St. Lawrence Trigge, under a bill of sale dated 19th July, 1907, from A. E. Wills, the said Jemmett and Trigge being then residents of the city of Toronto, an order was made that they should be served substitutionally by service upon R. C. LeVesconte, who claimed to be acting for them, and also on Donald A. Cameron, who held their power of attorney. At no time was Korbo named in the claim of lien or in the originating summons. H. T. Wills, one of the owners named in the claim of lien, was served with a copy of the lien upon 13th July, 1907, before the expiry of the 60 days.

The question to be determined is, has a proper action been taken against the owners under sec. 12, within the 60 days. So far as H. T. Wills and Short are concerned, they were both named in the lien. Wills was served with a copy of the lien. The originating summons is intituled as above, and is directed to all parties concerned, without name. Korbo has never been mentioned in any of the proceedings as a party defendant or as an owner, and was on 5th August served with a copy of the originating summons, 61 days inclusive after the filing of the lien, which would, under our Rules, bring the service within the time if he had been properly made a party. But it would not matter when he was served so far as this motion is concerned, if he had been originally a proper party by procedure. The question is, is he such and are Wills and Con. Short before the Court by action? Section 7 of the Ordinance provides that "a claim of lien may be deposited in the office of the mining

recorder for the district in which the mine is situated and in the office of the Gold Commissioner, and it shall state the name and residence of the claimant and of the owner and the property to be charged, and of the person for whom and upon whose credit the work was done or wood furnished, and the time or period within which the same was or was to be done or furnished, the work done, the sum claimed as due or to become due, the description of the property to be charged, and the date of the expiring of the period of credit."

So far as Wills and Short are concerned, the lien is correct in form. They are not the owners of the entire interest in the property, but they are the joint owners of an undivided half. Korbo, it appears, being the owner of the other undivided half. Korbo was a party to the lay agreement under which this lien arose, and was at all times a registered owner, as appears by the books of the Gold Commissioner's office. There could be no difficulty in ascertaining who the real owners were, because our Placer Mining Act provides for the registration of bills of sale: in fact, the Gold office recognizes no one as an owner who does not register his title. So that the plaintiff had ample notice of who the parties in title to the claim were, and of the parties whose interest he should have sought to affect by his proceeding. He deliberately left Korbo out of the lien claim, claiming only as against two owners of an undivided interest. I think, under the authorities, that any person having title at the time of the registration of the lien should be made a party to the proceedings in some way.

The first question is whether Short and Wills are such parties and are before the Court, and whether amendment should now be made to make them formally parties defendants. The Lien Act exists for the recovery of wages and supplies performed or delivered upon the mining claim for mining purposes and is an Ordinance which provides only for realizing out of the rem. There is no provision in the Ordinance by which a personal judgment may be recovered upon a contract against the contractor. Wills had notice that the lien was claimed against his interest, because he was served with a copy of the lien. He was also named in the lien, as well as Short, and I do not think that the fact that his name was omitted from the formal heading of the originating summons precludes the plaintiff now from proceeding

against them. The case of Bank of Montreal v. Haffner, 10 A. R. 592, is the authority relied upon by the owners. There it was held that "by instituting proceedings to realize a lien is meant that they shall be instituted against all parties whose interests are to be affected by such proceedings." Further, in the judgment of Osler, J.: "The plaintiff is at liberty to confine it to the owner, and to take a decree, as he has already done here, for the sale of the owner's interest, subject to the mortgage; but if he is not content with that, and desires to realize his claim by displacing to any extent the priority of the mortgagee, he can, in my opinion, only do so by making both owner and mortgagee parties for that purpose. It seems to follow that the action must be brought within the limited time against all parties whose rights it is intended to affect. The judgment binds only the interests of those who are parties to the proceedings. The person against whom the suit must be instituted within the time limited is the one against whom the right of lien may be asserted." And Patterson, J.A., in his judgment says: "The argument that an action to establish the lien against one man being brought within the 90 days, is sufficient to save the lien under sec. 21, leaving the lien holder at liberty, at any distance of time afterwards, to bring other actions against the same or other men to realize his lien, has no support from the statute, from necessity, or from the analogy of other proceedings, as, e.g., an action to recover land or money when the statutes of limitation come in question; and it is opposed by obvious considerations of convenience. The Mechanics' Lien Act should, of course, be so construed as to give all the rights it was intended to create, but at the same time so as not unnecessarily to increase its unavoidable interference with the power of an owner to deal with his property, or of an incumbrancer to benefit by his security." To the same effect is the case of McVean v. Tiffin, 13 A. R. 1. There it was held that, a mortgage existing, registered, prior to the registration of the lien, the mortgagee should have been made a party to the proceedings in the first instance and not under a decree affecting subsequent incumbrancers. I would also refer to the case of Davidson v. Campbell, 5 Man. L. R. 250. There the plaintiff made a mistake in claiming against the wrong contractor, and sought, after the expiry of the time, on the basis of his original bill, to claim against the proper defendant. It was

held that he could not rely upon the original bill. Against these authorities is cited the case of Cole v. Hall, 12 P. R. 584. But it will be seen that this case is distinguished from the ones I have cited in this, that the defendant sought to be affected was really a subsequent incumbrance, and Ferguson, J., who gave that judgment, distinguished Cole v. Hall from Bank of Montreal v. Haffner and McVean v. Tiffin, as follows: "In the case of Cole v. Hall the plaintiff commenced his action upon his lien, for the enforcement of it, within the period of 90 days prescribed by the Act, or, at all events, within this period as against all persons made parties in the first instance, and it was admitted that the lis pendens was duly registered. In short, it was not disputed that the plaintiff had taken all the steps that were necessary to preserve his lien, except that he had not made Rogers a party defendant in the writ, the contention being that the lien is nevertheless void as against Rogers, because no action to enforce it was brought against him within the prescribed period of 90 days." In Cole v. Hall the person sought to be affected was an execution creditor, who had placed his writ of fi. fa. lands in the sheriff's hands subsequent to the registration of the lien, but prior to the institution of proceedings by action thereunder, and it was there held that he was a subsequent incumbrancer. There is also the case of Makins v. Robertson, 6 O. R. 1, the head-note of that case being: "M. having bargained in January with R. and E. to do certain work and supply certain machinery in their mill, the last work being done and the last of the machinery supplied on the 28th July, filed his lien on the 25th August, and commenced his action on the 2nd October. On the 24th July R. and E. sold and conveyed the mill to P., who, not being aware of the claim, registered his conveyance on the 26th July. The lien registered made no mention of P. as owner:—Held, that M. was entitled to his lien, notwithstanding the sale to P., and the lien of P. as owner did not invalidate the lien." There the judgment of the Court—Ferguson, J.—rested upon the fact that the name of the owner when the building was commenced was mentioned in the lien, thus satisfying the requirements of the law. Under the Ontario Act the reputed owner may be named or the person whom the owner claiming the lien believes to be the owner of the property; and there is further provision in the Ontario Act that a mistake or misnomer

with the provisions of the Act in regard to the form of the lien shall satisfy the Act, and that no lien shall be invalidated by reason of failure to comply with the requisites. There is no such provision in our Ordinance. The law is that the name of the owner shall be given, and in the case I am considering the plaintiff was fully aware of Korbo's ownership in the land, both by notice under the registration provision of the Placer Mining Act, and Korbo being a party to the very lay agreement under which he claims his wages.

What I have to decide is whether Wills and Short were properly before the Court by action within the 60 days. I think they were. They had notice that it was intended to claim a lien against their lands, that the lien was actually filed, and they were served with the originating summons. It is true they were not named in the summons, but they knew that they were concerned in the lien, that it affected their lands by registration, and the summons was to all parties concerned. It is different in the case of Korbo. He was not named in the lien statement, neither was he named in the summons, and, so far as the formalities required by the Act were concerned, he was in no way interested in the filing of the lien. He was an owner; he was not named; and I doubt whether the adding of his name as a party defendant in the originating summons could have affected him after the error in omitting him from the formal claim of lien, and I do not see how the service upon him of the originating summons can heal the original error in omitting him from the statement of lien which forms the basis and foundation of the right to proceed and to bring the subsequent action. I have been referred to Phillips on Mechanics' Liens, and have read all the citations given me, but it seems to me that authority can be found there for any kind of laxity of proceeding. There is authority for the strict enforcement of the Act and for a more liberal interpretation of it so as to carry out the intention of the legislature to provide a lien for workmen. I prefer to rely upon the authorities of our own country or our own provinces having somewhat similar Mechanics' Lien Ordinances to our own.

My conclusion then will be that, as far as Wills and Short are concerned and their successors in title, they are properly before the Court by action, and that the claim may be amended to formally add their names, and that, in so

far as Korbo is concerned, a lien does not exist as against his interests in the land.

The costs of this motion will be costs in the cause except in so far as Korbo is concerned, who will be entitled to his costs in any event.

YUKON TERRITORY.

CRAIG, J. OCTOBER 25TH, 1907.

TRIAL.

DE BLEGIER v. LARSEN

Water and Watercourses—Placer Mining—Water Rights—Ditches—Diversion of Water—Water Regulations—Injunction—Damages—Costs.

Action for an injunction and damages in respect of trespass as stated in the judgment.

F. J. McDougal, for plaintiff.

Henry C. Bleecker, for defendant.

CRAIG, J.:—The parties to this action are the owners of placer mining hill or bench claims situated on Temperance Hill on the left limit of Gold Bottom and Hunker creeks. Both are entitled to draw water from Soda creek. The plaintiff, under Crown grants Nos. 5665 and 5667, issued under the water regulations, draws from a certain point of diversion with the right to ditch over Crown lands and convey the water to his mining properties on Temperance Hill. The defendant is entitled to draw water from the same creek, at a point of diversion about 1,500 feet below the point of diversion of the plaintiff under grant No. 5666. Both parties have constructed ditches under the regulations, the plaintiff having his ditch fully completed and in a condition to carry water on the date when he complains of the acts of the defendant, the defendant not having his ditch and flume fully completed, but only to a certain extent. It appears from the evidence that they are both mining by the hydraulic

method, carrying water to a reservoir from which it is piped and used in hydraulic mining. On 10th July of this year the defendant went on to the plaintiff's ditch, at a point some distance below the point of diversion, and blocked the ditch by damming it and opened the waste-gate, throwing the water down the hill into Soda creek below the plaintiff's dam; thence it was carried into his own reservoir; and again on 24th and 28th July he repeated the offence or trespass. He does not deny the act complained of, and, when spoken to about it, asserted that he did it under a right. On both occasions he blocked the ditch. and kept the waste-gate open, and the water running, as far as it would run, for about two days, and by so doing he deprived the plaintiff entirely of the use of the water for hydraulic purposes. The defendant did not seriously assert that he used the water for mining purposes, but that he used it for puddling or scouring the bottom of his ditch. Both parties acquired the rights to the water under the water regulations, both having precisely the same rights in the water and entitled to the full capacity of their grants; but by a special provision in all three grants it is provided that "where there is not enough water flowing in the creek to give them all their full rights under their grants, then the water shall be apportioned by the mining inspector on Hunker creek under the terms of the grants, which are that none of the three grants shall have priority over the other, and in case the said parties are unable to agree upon the user of the said water, when there is not enough water in Soda creek to supply the said parties, then the mining inspector on Hunker creek shall divide the use of the said water between the said parties into periods for use in rotation by giving each of them a number of hours every day, or for a longer interval, if he considers it more expedient, provided always that each is to have the same time of user of said water." This provision means that each of the three grantees has exactly the same rights in the water of Soda creek, the plaintiff taking under two of those grants and the defendant under the third. Neither of the parties applied to the mining inspector or to the mining authorities to have the water divided at the time of the trespass or at any time prior to that; but after the trouble arose, and on 28th July, all the parties interested met Mr. Gosselin, the then Assistant Gold Commissioner, on the ground, and discussed the matter. Mr. Gosselin then pointed out to the

defendant that he had no right to enter upon the ditch of the plaintiff, but that he should have applied to the proper authorities to divide the water when it became too scarce to supply the full volume given by the grants. The defendant at all times appeared to assert his right to enter upon the plaintiff's ditch or dam and to abate what his counsel called a nuisance, and the diversion of the whole stream by the plaintiff.

I am satisfied from the evidence that the plaintiff was at all times willing to apportion the water under the terms of the grants, and never refused to do so, and was at the time of the meeting with the Assistant Gold Commissioner willing to have the water then apportioned, or some arrangement made to meet the provisions in the grants affecting the division. From time to time the plaintiff applied to Corporal Smith, who was acting for the mining recorder on Hunker creek, to have the division made or to have the defendant go to Dawson and meet the mining engineer, as suggested by the Gold Commissioner, and have the matter adjusted. The defendant delayed from time to time until 2nd August, when he was served with proceedings in this case. But it is clear that on 2nd August he was on his way to Dawson before he was served with the papers, to see the mining recorder. After the service of the papers he took no further steps to have the matter adjusted, entered a defence, and proceeded to defend the action, alleging his right to do the acts complained of, at the same time setting up a counterclaim by which he alleged that he was entitled to draw a third of the water flowing in Soda creek under his grant, and that the plaintiff had at all times during the past season used, and intends to use, all the water flowing into Soda creek. He also claims some right to commit the acts complained of, because he is entitled to a half interest in two of the mining claims held by the plaintiff, and to which his water grants are appurtenant, but no serious contention at the trial was raised upon this point, and if he has any rights under the plaintiff's grants so far as they affect the mining claims in which he has undivided interests, those cannot be settled in this action, and he has no right to do the acts complained of under that title.

Some evidence was given of a diversion by the plaintiff of some water flowing in small tributaries or pups, as they are called, which enter Soda creek below the point of diver-

sion of the plaintiff, and which pups, it is alleged, the plaintiff has carried into his own ditch by boxes connecting with the pups, instead of carrying them over or under his ditch into their natural course into Soda creek, where the defendant will get the benefit of them, but there is no evidence to prove that the plaintiff did these acts at all, and no relief is sought for on that ground in the pleadings. I may say that upon this matter, so far as the matter can be settled in this Territory, it is settled in my own judgment in Misner v. Anglo-Klondike Mining Co., confirmed on appeal by the Court en banc.

The defendant contends that the injunction should not have been granted and should not be continued; that he had the right to do the acts complained of and to take his water in any way which he saw fit to do so. I am clearly against him on this contention. The plaintiff was acting strictly within his rights. He did nothing but what his grants permitted him to do, that is, erect a dam at the point of diversion and connect his ditch with it and carry that ditch over government lands to his mining claims. As soon as a person, having a grant to divert water, builds his ditch and takes the water into his ditch, it then becomes his personal property, his right to the ditch is exclusive, and the water flowing in it is subject to his control, and cannot be interfered with by any other person not having a superior right, and upon the evidence there was no other such person; the defendant had no superior right, and any rights which the defendant had to interfere with the user of the water by the plaintiff arose when the water became so low that there was not enough for all parties, and then his remedy was provided for in his grant, which was by application to the mining inspector for a division by rotation in time. The defendant is a trespasser as soon as he interferes with the private property of the plaintiff in his ditch. My view of the law is that so soon as a party having a grant under the water regulations carries the water into his ditch under his grant, the water becomes his, the ditch certainly is his, and it is as much a trespass and an interference with private rights as any other trespass would be upon the land or property of a person acquired in any other way; that his water grant gives him the absolute individual right in the ditch and during the continuance of his grant, on the observance of the regulations, it is his own private property and cannot be inter-

fered with by any other miner on the stream, unless he acquires rights by grant from the Crown to so interfere. For authority for this I would refer to Washburn on Easements, 307 and 398, Armstrong, 225, and Barringer & Adams, 641, 652, and 653. I think the defendant wrongfully interfered with the plaintiff's rights and private property, and is liable to pay damages and to have the injunction continued against him. The grant which a miner acquires under the water regulations gives him the right to do on the Crown lands, in the way of building his ditch and carrying his water, all that he could do on his own private lands within the terms of the grant.

As to the right to have an injunction, that matter is considered in the authorities I have already cited and also in the cases of Erdley v. Granville, 3 Ch. D. 826; Allen v. Martin, L. R. 20 Eq. 462; Kerr on Injunctions, 262. It has already been held by this Court that it is impossible to ascertain in money value the damages which might arise by reason of the interruption of the flow of water, to hydraulic operations or to mining operations. It might appear that it would be necessary in every case to have evidence given of that, but it is so apparent from the nature of these mining operations, and it has been laid down so often as a principle, that I do not think that evidence is required to prove that it is impossible to ascertain the loss which would occur in hydraulic mining by the stopping of the flow of water, say, for a few hours or a few days. The volume of the water varies so, and its operative force, of course, varies with the quantity of water flowing. The impossibility of watching at all times the whole course of a ditch miles long also leads one to the same conclusion. So that I think the damages which would arise from an interruption of the flow of water in a ditch cannot be ascertained, particularly when these interruptions are frequent, at uncertain periods, and for uncertain times.

The defendant still persists in his right to do what he did do, by his pleadings and by his evidence, and I therefore think that the injunction should be continued against him to restrain him from doing acts similar to the ones complained of, that is, that he has no right to enter upon the plaintiff's ditch below the point of diversion or to interfere with it in any way. The plaintiff is entitled to draw the amount of water provided for by his grant, and he must not interfere with the surplus flow in any way, but must provide

for that going down the stream to the defendant. who draws from a point of diversion below him. But all this can be arranged under the terms of their grants by the mining inspector.

No special damages were proved, and there will therefore be only nominal damages sufficient to carry costs.

As to the question of costs I am in some doubt. It seems to me that the action was rather precipitate, and that a little more time might have been given to the parties to adjust their differences. Both acted when in a state of heat or passion, but I think the defendant should, upon the service of the writ, at once have expressed his willingness to resort to the forum fixed by their grants. He did not do this, but went on to trial, asserting rights which have been determined against him. Therefore, I think he should pay the costs of the action.

There will be damages of $10 and an injunction in terms of my judgment, with the costs of suit.

YUKON TERRITORY.

CRAIG, J. OCTOBER 30TH, 1907.

CHAMBERS.

REX v. HALL.

Criminal Law—Bail before Committal for Trial—Amount of Bail—Serious Offence.

Motion for bail for the accused, who was charged with having on 30th July, 1907, stolen two post letter bags containing gold dust to the value of about $40,000.

C. W. C. Tabor, for the prisoner.

H. S. Tobin, for the Crown.

CRAIG, J.:—The accused has been up and remanded several times without any evidence being tendered on behalf of the Crown, who on the last remand put in an affidavit of the sergeant of police who is in charge of the investigation, stating that material witnesses were required from Fairbanks,

in Alaska, and from California. There is no certainty of when these witnesses can come, being outside of the jurisdiction; but it was indicated by the affidavit and by the statement of the Crown counsel that 6 weeks or 2 months at least will elapse before these witnesses can arrive. Some indication, however, of the nature of the Crown's case is given to me by counsel, the statement being that this gold dust was stolen from the post office at Dawson while the mail was in transit between Alaska and the State of Washington, and that Hall was one of the parties to the theft. Two other persons were arrested for the same theft, one now under arrest at White Horse, and the other who committed suicide after his arrest. A very small quantity of the gold dust has been recovered, and it was indicated that a large quantity of it was sold in the banks here, and that Hall was the intermediary in the sale, the Crown counsel and the detective stating that they have a strong case against the accused. Of course, the guilt or innocence of the accused is not a matter for me to settle upon this application, but it does enter into the consideration of the amount of bail, and as to the probability of the accused attending on his trial, if admitted to bail.

It is suspected that a large quantity of the gold dust is still hidden in and about Dawson. The accused is theoretically entitled to bail. The main question to consider is whether he will attend upon his trial, and to take such bail as will secure his attendance.

It is urged by the Crown that a Judge of this Court has no authority under the Code to hear an application for bail until the prisoner is committed for trial, and cites as an authority for that proposition Regina v. Cox, 16 O. R. 228, and the citation of the same case in Seager's Magistrate's Manual, p. 241. On a reading of that case I do not think it carries out the views of the Crown counsel, but is to the contrary effect, and I think that sec. 603 gives authority to entertain the application: "The power of the Court is to be exercised in the discretion of the Court, and no one can claim its benefit de jure:" Burn's Justice, p. 370.

In this case application was made for bail before the magistrate, who, without hearing argument or a full statement of reasons, refused the bail, stating that he preferred the matter to come up before a Judge of the Territorial Court, and giving leave to make the application if leave was

required. A Judge should not admit a person to bail, where the magistrate has properly refused it, but I do not take this to be such a case. The magistrate has not finally refused it; he simply transferred the matter over. Under all the circumstances, I think I should deal with the application and dispose of the matter. The amount of money stolen is large. There is some chance of an accused person admitted to bail, recovering the concealed treasure and carrying it away, and the bail must be made sufficiently large to guarantee his appearance. In this case he will be required to furnish 4 sureties besides himself in $10,000 each, that is, jointly and severally in $10,000, a total bond of $10,000. The names of the sureties must be furnished to the Crown officer 48 hours before the bail is accepted, and these sureties, besides making the ordinary affidavit of justification, must attend before the magistrate and submit to an examination as to their means and the property they have and their reliability, and upon satisfactory sureties being furnished then the prisoner may be admitted to bail in the sum mentioned. I require 4 sureties owing to our experience in this Territory of the unstable character of the population. Cases have occurred where some of our wealthiest mine-owners having become surety in civil suits in appeal have before the disposition of the appeal sold out all their property and left the country.

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STUART, J. JULY 10TH, 1907.

TRIAL.

GREAT WEST LUMBER CO. v. GRANT AND PENNEFATHER.

Vendor and Purchaser—Contract for Sale of Land—Specific Performance—Action Brought by Company Incorporated after Contract Made—Contract with Promoters of Company—Action—Refusal of Leave to Amend by Adding Promoters as Parties—Oral Agreement—Part Payment—Possession—Trespass—Injunction—Account.

Action for specific performance of an option for the purchase of a mill site. The option was given in writing by the defendants, to James W. Robinson, William McKenzie, and J. A. Steele, and it contained a provision allowing the company which the proposed purchasers intended to form to carry out the purchase. The company, when formed, entered into no new agreement with the defendants, but the plaintiffs alleged a verbal agreement with part payment and possession.

The defendants by counterclaim alleged that the plaintiffs were trespassers on the land covered by a certain timber limit used in connection with the mill-site, having no assignment of the land thereof, and asked for an account of the timber cut on this land, and for an injunction restraining the plaintiffs from cutting timber.

After the evidence was all taken, the plaintiffs applied to add Robinson, McKenzie, and Steele as parties plaintiffs.

W. L. Walsh, K.C., and W. Ernest Payne, Red Deer, for plaintiffs.

James Muir, K.C., and J. L. Crawford, Red Deer, for defendants.

STUART, J.:—At the close of the plaintiffs' case counsel for plaintiffs applied for leave to amend the style of cause and statement of claim by adding James W. Robinson and William McKenzie as parties plaintiffs with their consent, and by adding J. A. Steele as a party plaintiff with his consent, or if such consent was withheld then as a party defendant. This application was made upon the ground that, although the plaintiff company, whose action is one for specific performance of an agreement for the sale of a mill site, might conceivably fail, on the ground that the written agreement sued upon was made between the defendants and the proposed new plaintiffs personally, before the incorporation of the plaintiff company, and that no new agreement was ever entered into after incorporation between the plaintiff company and the defendants, yet, nevertheless, there certainly was, so it was alleged, an agreement entered into between the defendants and the proposed new plaintiffs, who were trustees for the company about to be formed, and that the Court, therefore, rather than dismiss the action entirely, would, in order to adjudicate completely and effectually upon and to settle all the questions actually involved, add other parties whose presence might be deemed necessary for that purpose. I refused the application, because I was of opinion at the time that the addition of new plaintiffs, in whom there would be a cause of action, in order to save the action from dismissal on the ground that the existing plaintiffs had no cause of action, was something not contemplated by Rule 35, and, although Rule 27 apparently provided for such a thing being done, I thought that an application under that Rule should have been made before the trial and not at so late a stage. I therefore directed the action to proceed in its existing form, but intimated that if, after hearing the evidence, I could find any authority to justify me in still allowing the amendment in the circumstances, I might do so. Counsel for the defendants then offered to permit the amend-

ments to be made upon terms, one of which would be the adjournment of the trial. This offer the plaintiffs refused to accept, and the trial then proceeded. Upon examining the precedents more carefully, I have found only two cases where new plaintiffs were added at so late a stage for the purpose for which it was proposed to add them in this case. In one case, Showell v. Winkup, 60 L. T. N. S. 389, the application had been made before trial, and refused, but without prejudice to a new application at the trial. In the other case, "The Duke of Buccleugh," 67 L. T. N. S. 739, the matter was purely formal. It was an admiralty action between two ships. The owners of the plaintiff ship, who were numerous, had been erroneously stated, and the application was merely to correct a misstatement as to the name of one of the partners who jointly owned the plaintiff ship. I think neither of these authorities is sufficient to justify me in now making the amendment. The only terms, in any case, upon which it could possibly have been made, were offered by the defendants at the trial and were refused. I must, therefore, consider the case as it stands and as it stood at the trial.

In the first place, I may say at once that I can find no sufficient evidence of any new verbal agreement having been entered into between the plaintiff company, after its incorporation, and the defendants. There was, indeed, considerable evidence of conversations between Robinson, one of the parties to the old agreement, and also a director of the company, and the defendants; but the most that can be said of these conversations is that they refer to the old agreement or option of 15th December, 1905. Adopting for the moment the plaintiffs' versions of these conversations, I think they undoubtedly indicate a belief in Robinson's mind that the old agreement was being kept in force, and that the company were bound by it, and not by any means a belief that he was verbally making a new agreement on behalf of the incorporated company, or any intention to make one by mere word of mouth. The plaintiffs must therefore fail in respect of the allegations made in paragraph 2 of their statement of claim.

This being so, I think the plaintiffs must also fail on the other ground. It seems to me to be impossible to disregard the authorities cited by the defendants' counsel. The option was given on 15th December, 1905, by the defendants to Robinson, McKenzie, and Steele personally. At that date

the plaintiff company were not in existence. They could not, therefore, afterwards ratify the contract. They could only enter into a new contract, which I hold was not done. This case is very similar to the case of Re Northumberland Avenue Hotel Co., 33 Ch. D. 16. Indeed, a great deal more had been done by the company in that case than was done here. The same principle is affirmed in Bagot Pneumatic Tyre Co. v. Clipper Pneumtic Tyre Co., [1902] 1 Ch. 146, also a very similar case. As to Howard v. Ivory Manufacturing Co., 38 Ch. D. 156, the distinguishing feature of that case was that the vendor became a director of the company afterwards organized, attended its meetings, and at such meetings assented to acts of the company, adopting and recognizing the contract. If Grant and Pennefather had taken stock in the plaintiff company, had become directors, and assented to all the company did, the present would have been a parallel case. But there was nothing of the kind done. It is true that cheques were taken from the company, and that Grant must have been aware of the enormous expenditure being made by them upon the property and property adjoining. But such was also the case in Re Northumberland Avenue Hotel Co. Upon the principle, therefore, of the two cases cited, I think the action must be dismissed.

Nevertheless, as upon appeal it is possible that the Court might take a different view of the application to add the new plaintiffs or of the right of the present plaintiffs to sue, and also as it will have a bearing upon the question of costs. I think it desirable that I should state shortly my view of the other aspects of the case. The chief contest is over the questions whether the two payments, which were made, were made and accepted as upon the purchase price under the option, and whether the occupation of the plaintiff was under the option or under the Bawtinheimer lease. There is no doubt that Robinson and McKenzie intended the payment of 3rd April to be a payment on the purchase money. The cheque given so states. The question is, was it received and accepted by Grant on that account? He says he did not so understand it; and that he never noticed the words "a/c purchase mill site" written upon it. Now, I regret to say that his story about this seems to me incredible. He says the payment of the cheque was a surprise, that he wondered what they would give him a $100 cheque for, that he kept the cheque in is pocket book for a month, and then went

to the bank, indorsed it, and deposited or cashed it. If he was so surprised at the visit of McKenzie, if he wondered so at the payment, surely he must have read the cheque, if not immediately, at any rate before cashing it. My own belief is that he did read it and that he knew it was for payment on the purchase price. He read quickly enough the memorandum on the cheque for $2,250 of 15th October, as is shewn by his letter of the following day asking about interest since 1st April. The testimony of the parties is conflicting, but, as far as corroboration is furnished by documentary evidence, it is, in my view, clearly in favour of the plaintiffs. I strongly incline to the opinion that the death of John A. Robinson of St. Thomas, and the advent of other individual interests in the persons of the parties entitled to his estate, really led to a change of front on the part of Grant and Pennefather, and that during the early summer they were still looking to the vendees to carry out the bargain contained in the option. I think that the payment of $1,300.65 upon the mortgage was made on account of the purchase price, and that it was so received and understood by Grant. Aside, therefore, from the question of the description of the property, with which I do not think it necessary now to deal, I am clearly of the opinion that if the addition of the new plaintiffs could have been allowed, such plaintiffs would have succeeded. The defence which succeeds is largely a technical and not a meritorious one. No doubt, if the defendants had insisted on retaining the personal liability of Robinson and McKenzie with respect to the timber dues, the latter would have readily given their individual guarantee. This is the only apparent reason why the defendants should refuse to convey to the plaintiff company instead of to the individuals. I therefore think there should be no costs allowed the defendants.

With regard to the defendants' counterclaim for an injunction against the plaintiffs and for an account, it would surely strike one as strange that the defendants should swear in the witness box that they always understood that the plaintiffs were operating under the Bawtinheimer lease, that they did not make any protest against it, that they took, as they say, three different payments from the plaintiffs on account of the dues, and yet now complain that the plaintiffs have wrongfully taken possession of their property. Taking the defendants' own evidence as given in Court as

true, they clearly had given the plaintiffs license to do what is now complained of. Besides, the lease itself provides that Bawtinheimer may form a joint stock company to carry out its provisions. Aside from an assignment or an underletting, which are both specifically forbidden in the first part of the clause, this can only mean that Bawtinheimer might hold the lease in trust for a company with whom he might made a partnership or other working arrangement, and this, I would imagine, is what Grant now really contends was being done, according to his understanding of the affair. Any injunction I might grant would not restrain Bawtinheimer from acting under his lease, nor from making a working arrangement with the plaintiff company of some kind which would not violate the covenant against assigning or subletting; neither would it be an easy matter to so word the injunction as to restrain Robinson and McKenzie, as agents of the plaintiffs, and yet leave them free as individuals to act under the option which I am of opinion they are entitled to do. As far as an account is concerned, the defendants assert that the Bawtinheimer lease is still in force, that the plaintiffs were acting under it, and that they received payments from the plaintiffs but solely on Bawtinheimer's account. Assuming this to be the case, I am of opinion that it is Bawtinheimer, and not the plaintiffs, who should be asked to account, or at any rate that Bawtinheimer should be a party to any action for an account at the instance of the defendants. No application has been made to add him as a party, and he was merely a witness at the trial. I therefore dismiss the counterclaim without costs, but without prejudice to any action which the defendants may see fit to bring against Bawtinheimer and the plaintiffs jointly for an account of the logs and timber taken.

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